Supreme Court, U.S.
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NO. 98-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHIEF JUSTICE ROBERT N.C. NIX, JR. (RETIRED), CHIEF JUSTICE JOHN FLAHERTY, ASSOCIATE JUSTICES STEPHEN ZAPPALA, NICHOLAS PAPADAKOS (RETIRED), RALPH CAPPY AND RONALD CASTILLE, AND JUDGE FRANK MONTEMURO (RETIRED), NANCY M. SOBOLEVITCH AND DAVID A. FRANKFORTER,
Petitioners,

V.

ROLF LARSEN
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When are an individual's constitutional rights "clearly established" such that a state official, whose conduct allegedly infringes on those rights, may be deprived of qualified immunity?

The Pennsylvania Constitution mandates the termination of state payment of compensation or benefits of any kind to former state officials removed from office. The Court of Appeals held that, by applying this constitutional provision to a former Justice of the Pennsylvania Supreme Court who was removed from office and convicted of impeachment, Petitioners violated that former Justice's "clearly established rights" under the Impairment of Contracts Clause, the Due Process Clause of the Fourteenth Amendment and the First Amendment. The questions presented are as follows:

1. a. Does a public employee's rights under a medical benefits plan administered by the state vest, so that any legislative change thereto would violate the Impairment of Contracts Clause of the United States Constitution?

   b. If the answer to the foregoing question is "yes," was the appellant's right to medical benefits "clearly established" in June of 1994?

2. a. Does the Due Process Clause of the Fourteenth Amendment entitle a former state official convicted of a felony and removed from office following a criminal trial, removed from office following proceedings before a state court of judicial discipline, and convicted of impeachment and removed from office following proceedings before the state legislature, to a separate hearing on whether he is entitled to continued state payment of medical benefits prior to the application of a provision in the state's constitution which forbids state payment of compensation or benefits of any kind to former state officials removed from office?

b. If the answer to the foregoing question is "yes," was this right "clearly established" in June of 1994?

3. a. Does the termination of a former state official's medical benefits following his removal from office, pursuant to a state constitutional provision which mandates the termination of state payment of any benefits following an official's removal from office, violate that former state official's "clearly established rights" under the First Amendment where he summarily alleges without any factual support that the motivation behind the termination of his medical benefits was to retaliate against him for constitutionally protected speech?

b. If the answer to the foregoing question is "yes," was this right "clearly established" in June of 1994?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellants below):

Certain present and former members of the Supreme Court of Pennsylvania: Chief Justice ROBERT N.C. NIX, JR. (Retired), Chief Justice JOHN FLAHERTY, Associate Justices STEPHEN ZAPPALA, NICHOLAS PAPADAKOS (Retired), RALPH CAPPY and RONALD CASTILLE; and Judge FRANK MONTEMURO (Retired), a member of the Superior Court of Pennsylvania, who sat by designation on the Supreme Court during the relevant time period

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B. The Third Circuit held that Larsen's rights under the Due Process Clause were "clearly established" without citing a single case or any principle of law supporting its decision. 14

C. The Third Circuit held that Larsen's rights under the First Amendment were "clearly established" based on nothing more than a summary allegation of improper motive without any factual support, a holding directly contrary to binding precedent of this Court. 17

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PRELIMINARY STATEMENT

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case. In this Petition, the Court is asked to establish a uniform standard among the circuits regarding when an individual's rights are "clearly established" so as to overcome a defense of qualified immunity.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 154 F.3d 82 (3d Cir. 1998) (Appendix A1-33). The district court's opinion is reported at 955 F. Supp. 1549 (M.D. Pa. 1997) (A34-107).

JURISDICTION

Respondent Rolf Larsen ("Larsen") commenced this action in the United States District Court for the Middle District of Pennsylvania on September 13, 1995. Jurisdiction of the district court was based on 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983. Jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291, pursuant to the collateral order doctrine, as applied to the defense of qualified immunity in *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The Court of Appeals' judgment was entered on August 11, 1998. On September 28, 1998, the Court of Appeals denied a timely filed petition for rehearing. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Article I, Section 10 of the United States Constitution provides: "No State shall . . . pass any . . . law impairing the Obligation of Contracts."

The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Article V, Section 16(b) of the Pennsylvania Constitution provides:

> **§ 16. Compensation and retirement of justices, judges and justices of the peace.**
>
> (b) . . . Except as provided by law, no salary, retirement benefit or other compensation, present or deferred, shall be paid to any justice, judge or justice of the peace who, under section 18 or under Article VI, is suspended, removed or barred from holding judicial office for conviction of a felony or misconduct in office or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute.

STATEMENT OF THE CASE

Larsen was a Justice on the Supreme Court of Pennsylvania until he was: (a) removed from office by an order of the Supreme Court of Pennsylvania, based on allegations that he engaged in criminal activities; (b) convicted on state drug charges, and removed from office pursuant to the sentence imposed by the Court of Common Pleas of Allegheny County, Pennsylvania; (c) removed from office by an order of the Pennsylvania Court of Judicial Discipline; and (d) convicted of impeachment and barred from holding public office by the Pennsylvania Senate. A4, A35.

A. Background

The history of this case dates back to 1988 when the Pennsylvania Judicial Inquiry Board began an investigation of Larsen regarding allegations of ethical wrongdoing. A5, A35-36. As a result, the Pennsylvania Supreme Court issued an order reprimanding Larsen for violations of the Pennsylvania Constitution and the Code of Judicial Conduct. Larsen sought reconsideration of the Supreme Court's order and filed petitions to recuse certain Justices of the Pennsylvania Supreme Court from consideration of the allegations against him. A5, A36. In these petitions, Larsen made accusations of malfeasance against these Justices. These new accusations prompted a grand jury investigation that cleared the other Justices of any wrongdoing, but produced further allegations of ethical and criminal wrongdoing by Larsen himself. A5, A37.

Thereafter, Larsen was impeached by the Pennsylvania House of Representatives and convicted by the Pennsylvania Senate. A40, A6. He also was convicted of felony drug charges and removed from office by order of the Court of Common Pleas for Allegheny County, and removed from office by order of the Pennsylvania Court of Judicial Discipline. A6, A38, A40-41. Pursuant to Article V, Section 16(b) of the Pennsylvania Constitution, Larsen's coverage for health care benefits was terminated. A7-8.

Larsen commenced this action in September, 1995, alleging that his impeachment trial before the Pennsylvania Senate, the proceedings against him before the Pennsylvania Court of Judicial Discipline, and termination of his medical benefits violated his civil rights. A8, A42. (A copy of Larsen's Amended Complaint is included in the Appendix at A108-139).

This petition for a writ of certiorari relates solely to the termination of Larsen's medical benefits.

B. The Termination of Larsen's Medical Benefits

In December of 1989, prior to Larsen's removal from office, the Pennsylvania Supreme Court adopted a medical benefits plan for retired members of the judiciary. A4. Costs of the plan were to be borne by the State of Pennsylvania, not by the individual official.

Until 1993, and at the time the Supreme Court adopted its medical benefits plan, the Pennsylvania Constitution expressly forbade payment of any "compensation . . . to any justice, judge or justice of the peace who is removed from office . . ." Pa. Const. Art. V, § 16(b) (repealed). A7. In a 1992 decision, the Pennsylvania Supreme Court held that the term "compensation" did not include retirement pension benefits, and, accordingly, that the Pennsylvania Constitution did not prohibit the payment of retirement pensions to judicial officials removed from office. *See Glancey v. State Employees' Retirement Bd.*, 610 A.2d 15, 22-23 (Pa. 1992). The *Glancey* decision did not address the issue whether medical benefits, as distinguished from retirement pensions, were included within the meaning of "compensation."

In August of 1993, the Pennsylvania Legislature amended the Pennsylvania Constitution to make clear its intention to prohibit the payment of any "salary, retirement benefit or other compensation, present or deferred" to any justice or judge suspended or removed from office. Pa. Const. Art. V, § 16(b). Larsen was a member of the Supreme Court when this amendment was enacted, and this amendment was in effect at the time of his criminal conviction, impeachment conviction, and removal from office. A7-8.

Following Larsen's removal from office, in June, 1994, he was informed that he would not be able to participate in the medical benefits plan. A7-8.

C. Larsen's Civil Rights Action

Larsen commenced this action under 42 U.S.C. § 1983 against the Supreme Court of Pennsylvania and present and former members thereof, and two employees of the Administrative Office of Pennsylvania Courts (collectively, "the Judicial Defendants"), alleging that the termination of his medical benefits violated his civil rights.[1] A7.

The Judicial Defendants moved to dismiss Larsen's claims against them in their personal capacities based on the doctrine of qualified immunity. The district court denied the Judicial Defendants' motion to dismiss. The Judicial Defendants appealed to the Court of Appeals for the Third Circuit pursuant to the collateral order doctrine. A4, A8.

The Court of Appeals held that the Judicial Defendants were entitled to qualified immunity from Larsen's claims under the Equal Protection Clause and the Public Health Services Act. However, the Court held that the Judicial Defendants may have violated Larsen's "*clearly established rights*" under the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Impairment of Contracts Clause. A33. Accordingly, the Court of Appeals held that the Judicial Defendants were *not* entitled to qualified immunity on these claims, and refused to dismiss Larsen's claims against them in their personal capacities. Thus, these issues would be tried before a jury in a federal court.[2]

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1. Larsen also sued the Senate of Pennsylvania and present and former members thereof challenging his impeachment conviction, and sued the Pennsylvania Court of Judicial Discipline and the Judicial Conduct Board challenging the disciplinary proceedings pending against him. A125-133.

2. In response to a question during oral argument before the Court of Appeals, it was pointed out that the reason Larsen sued under Section

(continued...)

REASONS FOR GRANTING THE PETITION

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court adopted an objective standard for determining qualified immunity, holding "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court refined *Harlow*'s "clearly established" requirement, holding that to survive the assertion of qualified immunity, the plaintiff must show the right was "clearly established." For purposes of qualified immunity, this Court declared that a right is "clearly established" only if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640.

In deciding what a "reasonable state official" should know about the intricacies of constitutional law, however, a conflict has developed among the Courts of Appeals regarding when an individual's rights are "clearly established" such as to deprive a state official of qualified immunity. The Fourth, Sixth, and Eleventh Circuits, for example, have adopted a "bright line" test, holding that an individual's rights are "clearly established" only when a materially similar case has been decided by this Court, the Court of Appeals of the respective circuit, or the highest court in the state where the alleged wrongdoing took place. Indeed, the Second, Fifth, Tenth and Eleventh Circuits specifically have held that dicta does not "clearly establish" law.

In the Ninth and Tenth Circuits, the plaintiff also must point to similar case law, unless the constitutional rights at issue

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2. (...continued)
1983 in the federal court rather than pursing a contract action in the state court was to qualify for counsel fees.

are so patently obvious they cannot be questioned. Nevertheless, where the rights at issue involve a balancing of competing interest – such as in the case of procedural due process – even the Ninth Circuit requires strong factual similarities in decided case law.

The Third Circuit's approach stands in sharp contrast to those of the Fourth, Sixth, Ninth, Tenth and Eleventh Circuits. As this case demonstrates, the Third Circuit's definition of "clearly established rights" includes rules of law not supported by any controlling precedent and, indeed, contradicted by holdings of this Court, by courts of other circuits, and by the Third Circuit itself. Thus, as discussed below, the Third Circuit has required the "reasonable state official" to guess at how the Court of Appeals for the Third Circuit might resolve an issue, and the price of guessing incorrectly is forfeiting the protection of qualified immunity, and being required to stand trial before a jury in federal court.

Last year, in *United States v. Lanier*, 520 U.S. 259 (1997), the Court held that an individual's rights may be "clearly established" without a decision from this Court in a factually identical case. *Id.* at 269. The Court did not, however, answer the question of what legal precedents *would* suffice to provide state officers with sufficient notice of an individual's constitutional rights. In the absence of clear guidance from this Court, the split among the circuits remains, and the protection afforded by the doctrine of qualified immunity depends on the circuit that happens to address a particular case.

Earlier this term, this Court granted certiorari in three cases raising the issue of qualified immunity. *Conn v. Gabbert*, 119 S. Ct. 39 (1998); *Hanlon v. Berger*, No. 97-1927, 67 U.S.L.W. 3321, 1998 U.S. LEXIS 7259 (U.S., Nov. 9, 1998); *Wilson v. Layne*, No. 98-83, 67 U.S.L.W. 3321, 1998 U.S. LEXIS 7260 (U.S., Nov. 9, 1998). *Wilson* and *Hanlon* involve the question whether the police violate an individual's "clearly established rights" under the Fourth Amendment in allowing television crews to accompany them during the execution of a

warrant, an issue on which the Fourth and Ninth Circuits are divided. *Conn*, also from the Ninth Circuit, involves an attorney's rights, under the Fourteenth Amendment, to freely communicate with his client while she was testifying before a grand jury. In each, this Court will be called upon to determine whether an individual's rights under the respective constitutional provisions were "clearly established" so as to overcome the defense of qualified immunity. Not one of these cases, however, enables this Court to resolve the conflict among the circuits, and to establish a uniform standard regarding what legal precedent will suffice to "clearly establish" an individual's rights so as to overcome a defense of qualified immunity.

The basic question for purposes of qualified immunity is what a reasonable state official should be required to know about constitutional law. The lower courts have been struggling with when an individual's rights are sufficiently "clearly established" that they should be known by a "reasonable state official" since the Court's ruling in *Harlow*. Despite the passage of time and numerous decisions from this Court, the issue remains unsettled. This case presents this Court with the opportunity to resolve the split among the circuits, and to set guidelines to ascertain when an individual's rights are "clearly established" so as to overcome the defense of qualified immunity when raised in a motion to dismiss.

I. The Court should grant this petition in order to establish a uniform test regarding when an individual's constitutional rights are "clearly established" so as to deprive state officials of qualified immunity.

The Court of Appeals for the Third Circuit upheld the denial of the Judicial Defendants claims of qualified immunity under an interpretation of "clearly established rights" that directly conflicts with holdings of this Court and at least four other Courts of Appeal. Larsen alleged that, by terminating his medical benefits pursuant to Section 16(b) of the Pennsylvania Constitution, the Judicial Defendants violated his "clearly

established rights" under the Impairment of Contracts Clause, the Due Process Clause, and the First Amendment. In holding that the Judicial Defendants were not entitled to qualified immunity, the Third Circuit determined that Larsen's rights were "clearly established." Yet it did so in the absence of any case law supporting its decision, based on dictum in state court opinions, and based on a determination directly contrary to holdings of this Court. This determination of what constitutes "clearly established rights" is markedly different from any other court in the nation.

In other jurisdictions, a "reasonable state official" receives specific directions as to when rights are "clearly established." In the Fourth, Sixth and Eleventh Circuits, for example, an individual's rights will not be deemed "clearly established" until a court in the relevant jurisdiction addressed a "materially similar" case. *See Jenkins v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir.) (en banc), *cert. denied*, 118 S. Ct. 412 (1997) ("In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose."); *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir.), *cert. granted*, No. 98-83, 67 U.S.L.W. 3321, 1998 U.S. LEXIS 7260 (U.S., Nov. 9, 1998) ("The law is clearly established such that an officer's conduct transgresses a bright line when the law has 'been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state."); *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 590 (6th Cir.), *cert. denied*, 512 U.S. 1236 (1994). Indeed, as the Eleventh Circuit observed, "[i]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1150 (11th Cir.) (en banc), *cert denied*, 512 U.S. 1236 (1994); *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1341 (11th Cir. 1998).

The Ninth and Tenth Circuits do not require factual identity in decided case law, provided that the questioned

conduct is so patently unlawful that decided case law is unnecessary: "When the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous preexisting case law is not required to show that the law is clearly established." *Harris v. Roderick*, 126 F.3d 1189, 1203 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1051 (1998). "Although a plaintiff need not show that the very action in question was previously held unlawful, she must demonstrate that there is a 'Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" *Horstkoetter v. Dept. of Public Safety*, No. 97-6367, 1998 U.S. App. LEXIS 27584, *32 (10th Cir., Oct. 28, 1998) (quoting *Medina v. Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)); *Garrett v. Rader*, 831 F.2d 202, 204-05 n. 2 (10th Cir. 1987); *Brewster v. The Bd. of Educ. of The Lynwood Unified Sch. Dist.*, 149 F.3d 971 (9th Cir. 1998). Nevertheless, where issues of law are subject to debate, even the Ninth Circuit demands "specific direction from cases" before depriving state officials of qualified immunity. *Brewster*, 149 F.3d at 983.

The Third Circuit has found rights to be "clearly established" without any clear guidance from a controlling court at all. In *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996), for example, the Third Circuit accepted an individual's rights under the First Amendment as "clearly established" based on precedent from the Fifth Circuit, while acknowledging that its holding "may be somewhat inconsistent with opinions of the Court of Appeals for the Fourth and Seventh Circuits." *Id.* at 1291; *see also Ryan v. Burlington County*, 860 F.2d 1199, 1208 (3d Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). The Third Circuit's decision in this case extends the bounds of "clearly established rights" well beyond that which any state official can reasonably be expected to know.

A. The Third Circuit held that Larsen's rights under the Impairment of Contracts Clause were "clearly established" based only on a *prediction* of how the state courts *might* rule *if* confronted with the question, and based, as the court itself stated, upon dictum from state court opinions.

Article I, Section 10 of the United States Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. Art. I, § 10. Larsen alleged that his rights under the Supreme Court's medical benefits plan vested before Section 16(b) of the Pennsylvania Constitution was amended, and, as a result, application of the amended version of Section 16(b) to terminate his medical benefits unlawfully impaired his contractual rights. A14, A134-136. Thus, for purposes of qualified immunity, the issue before the Court of Appeals was whether application of Section 16(b) in its amended form violated Larsen's "clearly established rights" under the Impairment of Contracts Clause. A12, A14. In holding that it did, the Court of Appeals speculated how the Pennsylvania Supreme Court *might* rule, *if* it were confronted with the issue of how or whether employee welfare benefits plans vest in order to give rise to contractual rights.

Since property rights are created by state law, *Board of Regents v. Roth*, 408 U.S. 564 (1972), to analyze Larsen's Impairment of Contracts claim, the Court of Appeals was required to determine whether, under Pennsylvania law, Larsen's rights under the medical benefits plan had vested. The Pennsylvania Supreme Court had *never* addressed the issue of whether or under what conditions medical benefits vest for public employees.[3] At most, the Supreme Court had addressed only *retirement pensions*. *Commonwealth ex rel. Zimmerman*

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3. Indeed, the district court itself recognized *in this case* that "[t]he issue of law that appears unsettled in Pennsylvania is whether the right to receive medical insurance benefits is a form of deferred compensation which, upon vesting, gives rise to unalterable contractual rights." A92.

v. Officers & Employees Retirement Bd., 461 A.2d 593, 595 (Pa. 1983); *Ass'n of Pa. State College and Univ. Faculties v. State System of Higher Educ.*, 479 A.2d 962, 965 (Pa. 1984).

The Court of Appeals rejected the district court's declaration that Pennsylvania law is "unsettled" on this issue, and held, in the absence of any controlling authority, that it was "clearly established" that Larsen's rights under the Supreme Court's medical benefits plan had vested.[4] Moreover, it determined this issue was "clearly established" based on language the court itself characterized as dictum in two state court decisions: "Moreover, while the Pennsylvania Supreme Court had not applied this rule in the precise context of medical benefits, *it had indicated in dictum that it would do so.* Thus, despite the lack of a precedent 'directly on point,' the law was sufficiently clearly established that a reasonable official would have known that an action that was unlawful as to other forms of retirement benefits also would be unlawful as to retirement medical benefits." A21 n. 13 (emphasis supplied).[5]

The Court of Appeals completely ignored the critical fact that, in making the decision to terminate Larsen's medical coverage, the Pennsylvania Supreme Court itself necessarily decided that although pension benefits may vest, medical coverage, such as those applicable in Larsen's situation, do not vest.

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4. The actual terms of the Supreme Court's medical benefits plan, however, were not before the Court of Appeals. A90. Thus, the court purported to hold that Larsen's rights under the plan were "clearly established" regardless of whatever the plan documents themselves provide.

5. In support of this assertion, the Court of Appeals cited two cases: *In re Upper Providence Police Delaware County Lodge No. 27*, 526 A.2d 315, 322 n.6 (Pa. 1987) and *Lower Merion Fraternal Order of Police Lodge v. Lower Merion Township*, 512 A.2d 612, 619 (Pa. 1986).

Moreover, mere dictum should not "clearly establish" an individual's constitutional rights. Had this case arisen outside the Third Circuit, it is clear that it would not. *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1342 n. 13 (11th Cir. 1998) ("We have already stated that 'the law cannot be established by dicta. *Dicta is particularly unhelpful in qualified immunity cases where we seek to identify clearly established law.*'" (emphasis supplied)); *Belcher v. City of Foley*, 30 F.3d 1390, 1400 (11th Cir. 1994) ("Law is clearly established by holdings, not by inferences from language in opinions."); *Wilson v. Meeks*, 52 F.3d 1547, 1555 (10th Cir. 1995) ("One ambiguous bit of dictum in a Ninth Circuit opinion cannot form the basis for a 'clearly established' and 'particularized' duty."); *Hodge v. Jones*, 31 F.3d 157, 167 n. 11 (4th Cir.), *cert. denied*, 513 U.S. 1018 (1994) ("*Defendants' failure to discover and appreciate the significance of dicta . . . is hardly a legitimate rationale for depriving them of qualified immunity.*" (emphasis supplied)); *Sorenson v. Ferrie*, 134 F.3d 325, 329 n.7 (5th Cir. 1998) ("The court's language, concerning a peripheral issue in a civil forfeiture case, *is dictum that hardly constitutes clearly established law.*" (emphasis supplied)); *Horne v. Coughlin*, 155 F.3d 26, 30 (2d Cir. 1998) ("We do not think this language clearly establishes Horne's right to counsel substitute. As a preliminary matter, the passage was dictum.").

Indeed, in holding that the law was "clearly established" that health care benefits are to be treated the same as retirement pensions for purposes of vesting, the Third Circuit not only ignored a vast body of case law reaching the opposite conclusion,[6] but also failed to appreciate that the only precedent from the state supreme court it relied upon was decided *before*

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6. In the context of ERISA, for example, the law is well established that employee welfare benefits, such as medical benefits, are fundamentally different from employee pension plans. Although pension plans vest, employee welfare plans do not, unless so provided under the plan itself. *See, e.g., Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

Section 16(b) was amended. Thus, the Third Circuit's holding would deprive a state official of qualified immunity for following the express terms of this constitutional mandate instead of anticipating the Third Circuit's prediction of how the Pennsylvania Supreme Court might rule on an issue that it previously had not addressed.

The Third Circuit stands alone in its opinion that an individual's constitutional rights can be "clearly established" by mere dictum and a prediction of how the state courts might rule. Allowing an individual's rights to be "clearly established" by dictum holds state officials to an *omniscient* standard, and severely compromises the protection afforded by the doctrine of qualified immunity.

B. The Third Circuit held that Larsen's rights under the Due Process Clause were "clearly established" without citing a single case or any principle of law supporting its decision.

The Court of Appeals upheld the denial of the Judicial Defendants' defense of qualified immunity from Larsen's Due Process claims without citing a single case supporting its decision. Specifically, without citing a single case holding that a separate hearing on the medical benefits issue was required, the Third Circuit held that Larsen's allegations set forth a violation of his "clearly established rights" under the Due Process Clause. In the Third Circuit's view, therefore, dictum is not even necessary: An individual's rights can be "clearly established" without reference to any previously established rule of law. We submit this is an impossible standard.

Application of Section 16(b) to Larsen followed his criminal trial, his impeachment trial, and proceedings against him before the Pennsylvania Court of Judicial Discipline. The Court of Appeals held that the law was "clearly established" that these proceedings did not satisfy due process: "[W]hile these proceedings allowed Larsen to contest the basis for his suspension and removal from office, none of them afforded him

an opportunity to address the distinct issue of whether medical benefits lawfully could be terminated as a result of that suspension and removal." A23. The Court of Appeals did not cite the source of any rule requiring a separate hearing. In other words, the Court of Appeals held that Larsen's rights were "clearly established" without reference to a single case supporting its decision. Not only is this alleged right *not* "clearly established," it is contradicted by holdings in several jurisdictions, including the Third Circuit itself.

Determination of what procedures satisfy the demands of due process involves a delicate balancing of private interests, the risks of erroneous deprivation of rights, and the government's interests in the administrative burdens of more extensive proceedings. *Mathews v. Eldridge*, 424 U.S. 319 (1976). As the Court of Appeals for the Ninth Circuit recently observed, "because procedural due process analysis essentially boils down to an ad hoc balancing inquiry, the law regarding procedural due process claims can rarely be considered 'clearly established' at least in the absence of closely corresponding factual and legal precedent." *Brewster v. The Bd. of Educ. of the Lynwood Unified School Dist.*, 149 F.3d 971, 983 (9th Cir. 1998) (quoting *Myers v. Morris*, 810 F.2d 1437, 1462 (8th Cir.), *cert. denied*, 484 U.S. 1437 (1987)). The standard adopted by the Third Circuit is clearly inconsistent with that of its sister circuits.

There are many examples of situations where an individual is deprived of a property or a liberty interest following a criminal conviction, as here, and no separate post-conviction hearing is required. For example, if an individual is convicted of a felony in Pennsylvania, that individual automatically loses the right to vote, the right to hold public office, and the right to own or possess firearms. *See* 18 U.S.C. § 921(g); 25 P.S. § 961.501; 18 Pa. Cons. Stat. § 6105. Upon conviction of certain crimes, public officials in Pennsylvania automatically forfeit *pensions*. 43 P.S. § 1311. Although these types of statutes have been challenged on various grounds, the Court of Appeals did not identify a single case holding that the

Due Process Clause requires a separate hearing when these property rights or liberty interests are revoked by the state following a criminal conviction.

Also analogous is Section 202(x) of the Social Security Act, which automatically suspends payment of social security benefits to any convicted felon incarcerated in a prison and not participating in an approved rehabilitation program. 42 U.S.C. § 402(x) ("Section 202(x)"). Even at the time the Judicial Defendants allegedly made the decision to apply Section 16(b) to terminate Larsen's medical benefits, the constitutionality of Section 202(x) repeatedly has been upheld against a variety of attacks. *Peeler v. Heckler*, 781 F.2d 649 (8th Cir. 1986); *Jones v. Heckler*, 774 F.2d 997 (10th Cir. 1985); *Jensen v. Heckler*, 766 F.2d 383 (8th Cir.), *cert. denied*, 474 U.S. 945 (1985); *Washington v. Secretary of Health and Human Services*, 718 F.2d 608 (3d Cir. 1983). Indeed, the Tenth and Second Circuits have specifically held that suspension of retirement benefits under Section 202(x) does not violate due process. *Zipkin v. Heckler*, 790 F.2d 16 (2d Cir. 1986); *Buccheri-Bianca v. Heckler*, 768 F.2d 1152 (10th Cir. 1985); *see also Butler v. Apfel*, 144 F.3d 622, 627 (9th Cir. 1998); *Davis v. Bowen*, 825 F.2d 799, 800 (4th Cir. 1987), *cert. denied*, 484 U.S. 1069 (1988).

Whether Larsen was provided with any pre-termination hearing is largely irrelevant because (a) the record is clear that Larsen never requested any such hearing, and (b) to this date, Larsen has never disputed the fact that he satisfies the prerequisites for application of Section 16(b) – he was removed from office. *Codd v. Velger*, 429 U.S. 624, 627 (1976) (holding that due process does not require a hearing when the underlying facts are not in dispute).

Thus, the Court of Appeals held that, by applying Section 16(b) to terminate Larsen's medical benefits, the Judicial Defendants violated Larsen's "clearly established rights" under the Due Process Clause without citing a single case supporting the conclusion that a separate hearing on the medical benefits

issue was necessary. This holding extends the bounds of what is "clearly established" well beyond the knowledge of any reasonable state official, the standard established by this Court.

C. The Third Circuit held that Larsen's rights under the First Amendment were "clearly established" based on nothing more than a summary allegation of improper motive without any factual support, a holding directly contrary to binding precedent of this Court.

The Third Circuit determined that the Judicial Defendants were not entitled to dismissal of Larsen's First Amendment claims because, it speculated, the Judicial Defendants' decision to apply Section 16(b) of the Pennsylvania Constitution to terminate Larsen's health care benefits "could have been" based on an improper retaliatory motive: "In this case . . . appellants were faced with a decision as to whether to subject Larsen to the more adverse 1993 version of section 16, a decision whose outcome, under the circumstances alleged by Larsen, *could have been* affected by a retaliatory motive" (emphasis supplied). A29. This holding is directly contrary to this Court's holdings in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998).

Whether allegations of improper motive are sufficient to overcome a claim of qualified immunity to a First Amendment claim has been the subject of several rulings of this Court. In each, this Court has repeated its admonition that a bare allegation of improper motive should not enable a plaintiff to overcome a claim of qualified immunity. For example, in *Harlow v. Fitzgerald*, this Court held that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow*, 457 U.S. at 817-18.

In its last term, this Court reaffirmed and clarified the objective standard of *Harlow*, and the standards to be applied in ruling on a motion to dismiss a First Amendment claim based

on qualified immunity. In *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998), this Court reaffirmed its holding that "bare allegations of malice would not suffice to establish a constitutional claim." *Crawford-El*, 118 S. Ct. at 1592. Therefore, to overcome a motion to dismiss based on qualified immunity, this Court declared, "[a] court may insist that the plaintiff 'put forth specific, nonconclusory factual allegations' that establish improper motive by causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 1596-97, *quoting Seigert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring).

The Court of Appeals did not cite, and appears not even to have considered, this Court's decision in *Crawford-El*.[7] Indeed, the Court of Appeals denied the Judicial Defendants' motion to dismiss based on nothing more than a bare allegation of an improper motive. Larsen makes the simple accusation that:

> The statements of [Mr.] Larsen in his petitions for disqualification and recusal were substantial or motivating factors in the decisions to deny him 'Fully State-Paid Basic & Specialized Coverage' for his lifetime under the medical plan, and to deny him such coverage for at least 18 months under [the Public Health Services Act].

A137. The Court of Appeals accepted this allegation and denied qualified immunity because the Judicial Defendants' decision to apply Section 16(b) to Larsen "could have been affected by a retaliatory motive." A29. But this is the very kind of speculation that this Court has repeatedly held not sufficient to overcome the defense of qualified immunity. The

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7. The Court of Appeals' failure to address *Crawford-El*, at a minimum, requires that this case be remanded to the Third Circuit for consideration of the impact of the Court's recent opinion on Larsen's allegations in this case.

Court of Appeals' rationalization, therefore, that dismissal based on qualified immunity was properly denied because "it is an inquiry that cannot be conducted without factual determinations as to the officials' subjective beliefs and motivations, and thus cannot properly be resolved on the face of the pleadings" (A27), is incorrect. As this Court has recognized, "[e]vidence concerning the defendant's subjective intent is simply irrelevant to [the] defense [of qualified immunity]." *Crawford-El*, 118 S. Ct. at 1596.

The Third Circuit's decision to deny the defense of qualified immunity to Larsen's First Amendment claim based merely on the speculation of what the Judicial Defendants' motives "could have been" is contrary to well-established law of this Court. In holding that Larsen's "clearly established rights" under the First Amendment were violated based on a speculation of improper motive, the Third Circuit abandoned the standards applicable for qualified immunity, and left state officials subject to personal liability in virtually any First Amendment motive-based case.

CONCLUSION

The basic question in this petition is whether Larsen's right to medical benefits was so clearly established that when they terminated his medical coverage, the Judicial Defendants violated his "clearly established" rights so as to deprive themselves of qualified immunity. The standard adopted by the Third Circuit of when an individual's rights are "clearly established" is in square conflict with that of other circuits. Moreover, it places an unjustified burden on state officials, and requires them to guess at how the Third Circuit, and indeed the applicable state tribunal, might decide an issue, lest they be exposed to personal liability. The "bright line" standard adopted by the Fourth, Sixth and Eleventh Circuits, requiring binding precedent in "materially similar" cases is much more realistic and should be applied uniformly among the circuits.

For the foregoing reasons, the Judicial Defendants request the Court to grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

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A 1

CORRECTED OPINION

Filed August 11, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7153

ROLF LARSEN

Appellee,

v.

SENATE OF THE COMMONWEALTH OF PENNSYLVANIA; ROY C. AFFLERBACH; ANTHONY B. ANDREZESKI; GIBSON E. ARMSTRONG; EARL BAKER; ALBERT V. BELAN; CLARENCE D. BELL; LEONARD J. BODACK; MICHAEL E. BORTNER; DAVID J. BRIGHTBILL; J. DOYLE CORMAN; MICHAEL M. DAWIDA; MICHAEL B. FISHER; VINCENT J. FUMO; STEWART J. GREENLEAF; MELISSA A. HART; DAVID W. HECKLER; EDWARD W. HELFRICK; EDWIN G. HOLL; ROXANNE H. JONES; ROBERT C. JUBELIRER; GERALD J. LAVALLE; CHARLES D. LEMMOND, JR.; H. CRAIG LEWIS; J. WILLIAM LINCOLN; F. JOSEPH LOEPER; ROGER A. MADIGAN; BRUCE S. MARKS; ROBERT J. MELLOW; HAROLD F. MOWERY, JR.; RAPHAEL J. MUSTO; MICHAEL A. O'PAKE; FRANK A. PECORA; JOHN E. PETERSON; EUGENE E. PORTERFIELD; TERRY L. PUNT; JEANETTE F. REIBMAN; JAMES J. RHOADES; ROBERT D. ROBBINS; FRANK A. SALVATORE;

ALLYSON Y. SCHWARTZ; TIM SHAFFER; JOHN J. SHUMAKER; PATRICK J. STAPLETON, WILLIAM J. STEWART; J. BARRY STOUT; RICHARD TILGHMAN; JACK WAGNER; NOAH W. WENGER; HARDY. WILLIAMS; SUPREME COURT OF PENNSYLVANIA; ROBERT NIX; JOHN FLAHERTY; STEPHEN ZAPPALA; NICHOLAS PAPADAKOS; RALPH CAPPY; FRANK MONTEMURO; RONALD CASTILLE; COMMONWEALTH OF PENNSYLVANIA COURT OF JUDICIAL DISCIPLINE; JOSEPH F. MCCLOSKEY; WILLIAM F. BURNS; DAWSON R. MUTH; PETER DEPAUL; CAROL K. MCGINLEY, CHRISTINE L. DONOHUE; JUSTIN M. JOHNSON; WILLIAM CASSENBAUM; JUDICIAL CONDUCT BOARD; JOSEPH A. DEL SOLE; ARTHUR J. EDMUNDS; DIANE M. EDMUNDSON; GERALD P. EGAN; JOHN W. HERRON; FREDERICK WELLS HILL; MATTHEW ANITA MACDONALD; GERALD J. O'CONNOR; ANDREW PALM; CHARLES W. RUBENDALL, II; JAMES E. RUSSO, BERNARD C. WATSON; WILLIAM J. ARBUCKLE, III; BRUCE A. ANTKOWIAK; THOMAS A. BERGSTROM; ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS*; NANCY M. SOBOLEVITCH; DAVID A. FRANKFORTER, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES; INDIVIDUAL SENATORS, CHIEF JUSTICE ROBERT N.C. NIX (RETIRED), CHIEF JUSTICE JOHN FLAHERTY, ASSOCIATE JUSTICES STEPHEN ZAPPALA, NICHOLAS PAPADAKOS, RALPH CAPPY AND RONALD CASTILLE, AND JUDGE FRANK

MONTEMURO, *THE ADMINISTRATIVE OFFICE OF PENNSYLVANIA COURTS, NANCY M. SOBOLEVITCH AND DAVID A. FRANKFORTER,

Appellants.

*Dismissed pursuant to Clerk order dated 6/27/97

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(No. 95-CV-01540)
154 F.3d 82

Argued May 19, 1998

BEFORE: SLOVITER, GREENBERG, and GIBSON,*
Circuit Judges

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*Honorable John R. Gibson, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

(Filed: August 11, 1998)

OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

Appellants, present and former justices and court administrators of the Supreme Court of Pennsylvania, appeal from the district court's February 28, 1997 order denying their motion to dismiss appellee Rolf Larsen's claims against them on qualified immunity grounds. The district court had jurisdiction over Larsen's claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343 as Larsen states his claims under 42 U.S.C. § 1983 and 42 U.S.C. § 300bb. Jurisdiction over this appeal from a denial of qualified immunity rests on 28 U.S.C. § 1291 pursuant to the collateral order doctrine. *See Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 2817 (1985). For the reasons that follow, we will affirm in part and reverse in part the district court's denial of qualified immunity and will remand the case to the district court for further proceedings.

II. FACTUAL AND PROCEDURAL HISTORY

This case arises from appellants' June 1994 decision to terminate the medical insurance benefits of appellee Rolf Larsen, a former justice of the Supreme Court of Pennsylvania, following his conviction on felony charges in the Allegheny County Court of Common Pleas and his suspension from office pursuant to an order of the Pennsylvania Court of Judicial Discipline. In November 1977, Larsen was elected to a ten-year term on the Pennsylvania Supreme Court beginning in January 1978. In November 1987, Larsen won a retention election for a second ten-year term beginning in January 1988. On December 12, 1989, toward the end of Larsen's 12th year as a Supreme Court justice, the Supreme Court adopted a benefits plan which provided lifetime medical insurance benefits for retired judges with ten or more years of judicial service, regardless of their age. *See* app. at 93.

On July 17, 1991, the Pennsylvania Judicial Inquiry Review Board ("JIRB"), following an investigation into allegations of misconduct, reported to the Pennsylvania Supreme Court that Larsen had created an appearance of impropriety by engaging in *ex parte* communications with a trial judge in a pending case. The JIRB recommended that Larsen be reprimanded publicly. *See* app. at 72. On October 14, 1992, the Supreme Court, acting through a panel of three justices, adopted the JIRB's recommendation and issued an order publicly reprimanding Larsen. *See In re Larsen*, 616 A.2d 529 (Pa. 1992). Justices Zappala and Cappy voted in favor of the order while Justice Papadakos dissented.

On November 24, 1992, Larsen filed a petition before the Supreme Court seeking the disqualification and recusal of Justices Zappala and Cappy on the grounds that these justices, together with Chief Justice Nix and other individuals, had engaged in various forms of misconduct involving *ex parte* communications, kickbacks, partiality toward litigants and interference in pending cases. *See* app. at 72-73; 769. A grand jury then commenced a nine-month investigation into Larsen's accusations and on November 5, 1993, released a report stating that it had found evidence of further wrongdoing by Larsen.[1] The grand jury reported that Larsen had maintained a list of petitions for allowance of appeal to be afforded special handling by his staff and had obtained prescription tranquilizers for his own use by causing a physician to issue prescriptions in the names of members of his judicial staff. *See* app. at 76.

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1. While the 1992 grand jury reported no evidence to substantiate Larsen's accusations against the other justices, the United States District Court for the Eastern District of Pennsylvania later found that Chief Justice Nix had interfered substantially in a pending criminal case. *See Yohn v. Love*, 887 F. Supp. 773 (E.D. Pa. 1995), *aff 'd in relevant part*, 76 F.3d 508 (3d Cir. 1996).

The Attorney General of Pennsylvania, acting on a presentment issued by the grand jury on October 22, 1993, brought criminal charges against Larsen relating to his unlawful acquisition of prescription medications. By order dated October 28, 1993, the Supreme Court relieved Larsen of all judicial and administrative duties as a justice, but did not suspend his pay. *See* app. at 76.

On November 23, 1993, the Pennsylvania House of Representatives adopted House Resolution Number 205 authorizing its judiciary committee to investigate Larsen. *See* app. at 77. That investigation culminated in a writ of impeachment summons which eventually resulted in Larsen's conviction on October 4, 1994. *See* app. at 790. Larsen has brought claims challenging various aspects of the impeachment proceedings. Those claims are the subject of separate appeals before this court and thus we do not address them in this opinion.

On April 9, 1994, after a five-day trial before the Court of Common Pleas of Allegheny County, a jury convicted Larsen of two counts of felony conspiracy for unlawful procurement of controlled substances. *See* app. at 77.[2] On June 3, 1994, the Pennsylvania Court of Judicial Discipline suspended Larsen from office without pay based on Article V, § 18(d)(2) of the Pennsylvania Constitution, which authorizes orders "directing the suspension, with or without pay, of any justice, judge or justice of the peace . . . against whom has been filed an indictment or information charging a felony." *See* In re Larsen, 655 A.2d 239 (Pa. Ct. Judic. Disc. 1994).

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2. Larsen contended that the prescription tranquilizers were medically necessary and that he had them prescribed in the names of third parties to protect his privacy.

The Court of Common Pleas sentenced Larsen on June 13, 1994, and as part of its sentence removed Larsen from judicial office pursuant to Article VI, § 7 of the Pennsylvania Constitution, which provides that, "[a]ll civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime." *See Larsen v. Senate of Pennsylvania*, 646 A.2d 694, 697 (Pa. Commw. Ct. 1994).

In a letter dated June 17, 1994, David A. Frankforter, Human Resources Manager for the Court Administrator of Pennsylvania, acting on behalf of Court Administrator Nancy Sobolevitch and the justices of the Pennsylvania Supreme Court, notified Larsen that he was ineligible to receive retirement medical benefits as of June 3, 1994, the date of the Court of Judicial Discipline order suspending Larsen without pay. *See* app. at 94.

Until 1993, the Pennsylvania Constitution contained a provision mandating that, "[n]o compensation shall be paid to any justice, judge or justice of the peace who is suspended or removed from office. . . ." Pa. Const. art. V, § 16(b). In a 1992 decision, the Pennsylvania Supreme Court, analyzing the language and history of that provision, held that its denial of "compensation" to suspended or removed judges did not encompass retirement benefits. Thus, the court held that judges who had been removed from office for misconduct could not be denied retirement benefits based on that provision. *See Glancey v. State Retirement Bd.*, 610 A.2d 15, 22-23 (Pa. 1992).

In 1993, section 16 was amended to provide that, "[e]xcept as provided by law, no salary, retirement benefit or other compensation, present or deferred, shall be paid to any

justice, judge or justice of the peace who . . . is suspended, removed or barred from holding judicial office." Pa. Const. art. V, § 16(b). Therefore, in contrast to the prior version of section 16(b) which addressed only "compensation," the 1993 version explicitly encompassed retirement benefits and other forms of deferred compensation and provided for the denial of such benefits upon removal.

Larsen commenced this action on September 13, 1995, by filing a complaint in the United States District Court for the Middle District of Pennsylvania under 42 U.S.C. § 1983 which, insofar as material to this opinion, alleged that appellants' June 17, 1994 decision to terminate his medical benefits violated his rights under the Impairment of Contracts Clause, U.S. Const. Art. I, § 10, the Due Process and Equal Protection Clauses, U.S. Const. amend. XIV, § 1, the First Amendment, U.S. Const. amend. I, and the Public Health Services Act, 42 U.S.C. §§ 300bb-1 et seq. Appellants moved to dismiss Larsen's claims on the grounds that his complaint failed to state a claim on which relief could be granted and that his claims were barred by the doctrine of qualified immunity. In an opinion and order dated February 28, 1997, the district court denied appellants' assertion of qualified immunity. *See Larsen v. Senate of the Commonwealth of Pennsylvania*, 955 F. Supp. 1549, 1580 n.31 (M.D. Pa. 1997). Appellants filed a timely notice of appeal on March 27, 1997.[3]

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3. By orders dated June 18, 1997, and September 30, 1997, this appeal was consolidated with, respectively, the appeals in numbers 97-7296 and 97-7451 which concern Larsen's challenge to his impeachment. This opinion, however, concerns only the appeal in number 97-7153.

III. DISCUSSION

A. Clearly Established Rights

Initially we set forth the framework for our analysis. In *Seigert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 1793 (1991), the Supreme Court explained that when a qualified immunity defense is raised a court first should determine whether the plaintiff has asserted a violation of a constitutional right at all. Only if that question is answered affirmatively need the court determine whether the defendant is entitled to qualified immunity on the grounds that his conduct did "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). The Court recently reaffirmed this principle in *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n.5 (1998). In this case we largely focus on the second question because we are satisfied that except with respect to the equal protection of the law and the Public Health Services Act claims Larsen adequately asserted a violation of his constitutional rights.

In considering the second question we recognize that qualified immunity is from suit as well as from liability, so that "[u]nless the plaintiff 's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Mitchell*, 472 U.S. at 526, 105 S. Ct. at 2815. For purposes of this appeal from the district court's denial of qualified immunity based upon the pleadings, we must accept Larsen's allegations as true and afford him the benefit of all reasonable inferences. *See Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996). Appellants' entitlement to qualified immunity under these standards is a question of law subject to plenary review.

See Pro v. Donatucci, 81 F.3d 1283, 1285 (3d Cir. 1996); *Giuffre v. Bissell*, 31 F.3d 1241, 1247 (3d Cir. 1994).[4]

A right is "clearly established" for qualified immunity purposes only if "[t]he contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1982). Thus, defendants are entitled to qualified immunity if "reasonable officials in [their] position at the relevant time could have believed, in light of what was in the decided case law, that their conduct would be lawful." *In re City of Philadelphia Litig.*, 49 F.3d 945, 961 n.14 (3d Cir. 1995). Even where officials "clearly should have been aware of the governing legal principles, they are nevertheless entitled to immunity if based on the information available to them they could have believed their conduct would be consistent with those principles." *Acierno v. Cloutier*, 40

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4. The district court addressed the qualified immunity issue as follows:

> [appellants'] arguments in support of qualified immunity are limited to the same arguments they assert in support of the outright dismissal of Larsen's claims. As the court has determined that these arguments provide no basis upon which to dismiss Larsen's . . . claims, they also provide no basis upon which to afford [appellants] immunity from suit in their personal capacities.

Larsen, 955 F. Supp. at 1580 n.31. Thus the court did not distinguish the issue of whether the complaint alleged viable claims for purposes of Federal Rule of Civil Procedure 12(b)(6) from the issue of whether it alleged violations of clearly established rights within the meaning of the qualified immunity doctrine. Our analysis largely turns on a de novo inquiry as to the latter issue, *See Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815, as we are satisfied that for the most part Larsen adequately has asserted a violation of his constitutional rights.

F.3d 597, 620 (3d Cir. 1994) (citations and internal quotations marks omitted).

However, for reasonable officials to be on notice that their conduct would be unlawful, there need not be "a previous precedent directly on point." *Acierno*, 40 F.3d at 620; *accord Anderson*, 483 U.S. at 640, 107 S.Ct. 3039 (holding that the "clearly established" standard does not require that "the very action in question has previously been held unlawful"). Rather, there need only be "some but not precise factual correspondence between relevant precedents and the conduct at issue," *Pro*, 81 F.3d at 1292 (citations and internal quotation marks omitted), so that "in the light of pre-existing law the unlawfulness [would be] apparent." *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039. We must determine, in light of these principles, whether Larsen alleges violations of clearly established rights.[5]

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5. Larsen, br. at 14, contends that the doctrine of qualified immunity is inapplicable because appellants' revocation of his medical benefits involved "a ministerial, non-discretionary act." *See People of Three Mile Island v. Nuclear Regulatory Comm'rs*, 747 F.2d 139, 143 (3d Cir. 1984). We disagree. As the Supreme Court recognized in *Davis v. Scherer*, 468 U.S. 183, 195 n.14, 104 S. Ct. 3012, 3020 n.14 (1984), officials must make discretionary determinations even in the course of applying facially clear provisions. Because appellants' decision to deny Larsen's benefits required such discretionary determinations, including legal analysis as to the applicability of the 1993 version of section 16(b), it cannot be characterized as a ministerial act outside the scope of the qualified immunity doctrine.

B. Impairment of Contracts Clause

Appellants contend that the district court erred in denying them qualified immunity as to Larsen's claim that termination of his benefits violated his rights under the Impairment of Contracts Clause, which provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. According to appellants, Larsen's right to receive those benefits following his removal from office was not clearly established, since reasonable officials could have believed either that Larsen was not eligible for benefits under the terms of the benefits plan, or that Larsen, even if otherwise eligible for benefits, lawfully could be denied those benefits pursuant to the 1993 version of Article V, section 16, of the Pennsylvania Constitution which precludes payment of benefits to justices who have been removed from office.

1. Eligibility Under the Retirement Benefits Plan

Appellants contend that Larsen fails to allege a clearly established right to receive retirement medical benefits because, according to his complaint, the plan conferring the right to those benefits applied only to "retired" members of the judiciary. Thus, appellants argue, a reasonable official "would have been justified in concluding that Larsen was not covered" by the terms of the benefits plan since he had been removed from office and had not "retired" voluntarily. Br. at 12. We disagree. As of the time appellants decided to deny Larsen's benefits, the Pennsylvania Supreme Court had held that judicial officers who had been removed from office for misconduct were entitled to receive benefits under a plan which by its terms applied to "retired" judicial officers. In upholding removed judges' right to receive "retirement" benefits, the Pennsylvania Supreme Court did not find it significant that those judges had

not "retired" voluntarily from office. Rather, the court treated them as fully eligible under the retirement plan and proceeded to analyze whether a separate provision of law precluded them from receiving those benefits to which they were entitled under the plan. *See Glancey*, 610 A.2d at 22-23.[6] The decision in *Glancey* forecloses appellants' argument that officials charged with administering a retirement benefits plan reasonably could construe the terms of that plan narrowly to exclude removed judges from coverage when the Pennsylvania Supreme Court had included such individuals in the terms of eligibility.[7]

In light of this case law including individuals such as Larsen within the terms of eligibility for retirement benefits, and in the absence of any authority for excluding individuals from eligibility under a retirement plan on the grounds that they were involuntarily removed from office, we find that it was clearly established that Larsen could not be disqualified from

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6. *Glancey* resolved the cases of several different judges, some of whom were removed while still in office and others of whom were not issued removal orders until after they had resigned or retired. The court treated those judges identically in terms of their eligibility for benefits under the retirement plan. *See* 610 A.2d at 22-23.

7. The Pennsylvania Supreme Court had reached similar results in cases involving "retirement" plans for elected officials and public employees, upholding the eligibility under such plans of individuals who did not retire voluntarily. *See Bellomini v. State Retirement Bd.*, 445 A.2d 737, 741 (Pa. 1982) (holding that legislators who resigned under pressure at about the time of their criminal convictions were entitled to "retirement" benefits); *Harvey v. Retirement Bd. of Allegheny County*, 141 A.2d 197, 203 (Pa. 1958) (holding that public employee who had been dismissed for cause was entitled to "retirement" benefits); *Wright v. Retirement Bd. of Allegheny County*, 134 A.2d 231, 233-34 (Pa. 1957) (holding that public employee who had been separated involuntarily from employment was entitled to "retirement" benefits).

receiving benefits under the terms of the benefits plan. Accordingly, we must consider whether appellants are entitled to qualified immunity on the grounds that they reasonably could have believed that Article V, section 16, as amended in 1993, operated to divest Larsen of benefits which he otherwise would have been eligible to receive.

2. Divestiture of Benefits Pursuant to Section 16

Appellants contend that they are entitled to qualified immunity because a reasonable official could have believed that their revocation of Larsen's benefits was lawful pursuant to the 1993 version of section 16, which provides that judges who are suspended or removed from office shall not receive any "salary, retirement benefit or other compensation, present or deferred." Pa. Const. art. V, § 16(b). Larsen, however, contends that the application of that provision violated his clearly established rights, as it was adopted after his right to retirement benefits had vested in 1989, at which time he had completed ten years of service and thus had satisfied all requirements necessary to receive full retirement benefits.[8] Larsen emphasizes that the version of section 16 in effect at the time his rights vested did not revoke retirement benefits upon removal from office. *See Glancey*, 610 A.2d at 22-23. Thus, Larsen argues that the 1993 amendment to that provision unilaterally altered the terms of his employment compensation, retroactively depriving him of contractual rights which had vested before the amendment and violating his right against impairment of contractual obligations. *See* br. at 19.

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8. Vesting occurs when an individual "has completed the number of years of service required for eligibility" to receive benefits under the terms of a retirement plan. *Police Pension Fund Ass'n Bd. v. Hess*, 562 A.2d 391, 395 (Pa. Commw. Ct. 1989).

We agree. The Pennsylvania Supreme Court has held that,

> [i]t has long been recognized in Pennsylvania that the nature of retirement provisions for public employees is that of deferred compensation for service actually rendered in the past. And it is the law of this Commonwealth that unilateral modifications . . . after retirement eligibility requirements have been met, may not be adverse to the [employee].

Commonwealth ex rel. Zimmerman v. Officers & Employees Retirement Bd., 461 A.2d 593, 595 (Pa. 1983) (citations omitted). In *Zimmerman*, the Commonwealth sought to terminate a public official's retirement benefits based on a statute providing for forfeiture of the right to such benefits upon conviction of a crime related to public office. The court, finding that the official's vested right to retirement benefits had accrued before enactment of the statute, held that that right "cannot be reached by a retroactive forfeiture provision," and thus upheld the official's right to receive retirement benefits despite his conviction for crimes that warranted forfeiture under the statute. *See id.* at 598.

In reaffirming its decision on reargument, the court reiterated that, "[i]t is [the] attempt to divest previously vested rights of a public . . . official by subsequent legislative judgment that we find to be a constitutionally impermissible retroactive divestment of vested rights." *Commonwealth ex rel. Zimmerman v. Officers & Employees Retirement Bd.*, 469 A.2d 141, 142 (Pa. 1983) (per curiam). Justice Zappala, one of four justices who joined in the majority opinion, wrote separately "to emphasize that no law, regardless of how noble its purpose

may retroactively affect existing contract obligations. U.S. Const. art. 1 § 10. cl. 1. . . . Once a contractual obligation vests . . . the same cannot be altered, amended or changed by unilateral action." 469 A.2d at 144 (Zappala, J., concurring). We find that these precedents analyzing an impairment of contract claim under circumstances closely analogous to those in the present case clearly establish that retirement benefits could not lawfully be denied based upon a provision adopted after the right to receive those benefits had vested.[9]

Appellants contend that *Zimmerman* is distinguishable because the official in that case had begun receiving benefits before the Commonwealth sought to terminate them. However, *Zimmerman* expressly noted that the court's prior decisions had established that a subsequently adopted provision "could not prevent the payment of benefits to employees whose . . . rights were vested in enjoyment" before passage of the provision. *See id.* at 143 (citing *Bellomini v. State Employees' Retirement Bd.*, 445 A.2d 737 (Pa. 1982)). The court then held that the same principle applied where the official's "right in the terms of entitlement, although not enjoyment, had vested" before passage of the benefits forfeiture provision. *Id.* Thus, *Zimmerman* establishes that the dispositive time after which an employee's right to benefits cannot be altered is the time of the vesting of those rights "in the terms of entitlement." In this case, Larsen's right to retirement benefits vested in terms of entitlement in 1989, at which time he had satisfied all conditions necessary to receive full retirement benefits, and

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9. Because Larsen's right to retirement benefits had vested before adoption of the 1993 constitutional amendment, we need address only the implications of applying that amendment retroactively to previously vested rights. Accordingly, our opinion has no application to individuals whose rights vested after 1993.

under the law that existed at that time, those benefits could not be terminated upon removal from office. *See Glancey*, 610 A.2d 15. Accordingly, it was clearly established that Larsen could not be denied benefits based upon a provision adopted in 1993.[10]

Numerous other Pennsylvania cases have reached the same result precluding infringements on previously vested rights based on rules that did not exist at the time of vesting. In *Association of Pennsylvania State College & Univ. Faculties v. State Sys. of Higher Educ.*, 479 A.2d 962, 965 (Pa. 1984), the court, applying both the federal and state Impairment of Contracts Clauses, held that the "constitutional infirmity" of an adverse amendment of previously existing rules "with respect to [employees] whose entitlement to retirement benefits had already vested is clear." Thus, the court held that the amendment was "void as applied to employees whose rights were vested prior to its enactment." *Id.*; *accord Burello v. State Employes' Retirement Sys.*, 411 A.2d 852, 855 (Pa. Commw. Ct. 1980) (citations omitted) ("[W]hen the conditions of retirement eligibility have been satisfied, retirement pay has ripened into a full contractual obligation and become a vested right [which] cannot be disturbed by subsequent legislation."); *Harvey v. Allegheny County Retirement Bd.*, 141 A.2d 197, 203 (Pa. 1958) (holding that employee who had "complied with all conditions necessary" to receive benefits "cannot be affected adversely by subsequent legislation which changes the terms of the retirement contract"); *Wright v.Allegheny County*

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10. *Zimmerman*, in dictum, distinguished the situation before it from a situation where a removal due to misconduct would result in the official's "failure . . . to complete the term of eligibility." *See* 469 A.2d at 143. This dictum does not apply to Larsen, who had satisfied the term of eligibility before he was removed from office and before the benefits forfeiture provision was adopted.

Retirement Bd., 134 A.2d 231, 233-34 (Pa. 1957) (holding that a provision which was adopted after an employee's rights had vested but before employee retired could not lawfully be applied, as the employee's rights were "vested and unqualified" under the previously existing law and "could not be qualified or altered" by a subsequent enactment).[11]

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11. The Pennsylvania Impairment of Contracts Clause provides that, "[n]o . . . law impairing the obligation of contracts . . . shall be passed." Pa. Const. art. I, § 17. Because the Pennsylvania cases discussed above apply the federal Impairment of Contracts Clause, *See*, e.g., *Association of Pennsylvania State College & Univ. Faculties*, 479 A.2d at 964; *Zimmerman*, 469 A.2d at 144 (Zappala, J., concurring); *Burello*, 411 A.2d at 855, they clearly establish Larsen's rights under federal law, particularly absent any federal precedent to the contrary. *See Mississippi v. Miller*, 276 U.S. 174, 179, 48 S.Ct. 266, 268 (1928) (holding that "retroactive application" of a law adopted "after services have been rendered" would deprive employee of an amount" he had theretofore earned" and thus "would impair the obligation of the . . . contract" that existed at the time service was rendered). In *Dodge v. Board of Educ. of Chicago*, 302 U.S. 74, 77-78, 58 S.Ct. 98, 99-100 (1937), the Court permitted an impairment of retirement benefits, but did so on the grounds that state law rendered those benefits "mere gratuities" that did not give rise to vested contractual rights. Thus, *Dodge* is inapposite in this case where the benefits are a form of deferred compensation to which employees have enforceable contractual rights, *see Zimmerman*, 469 A.2d at 142 ("[W]e have rejected the view that pension benefits are mere gratuities . . . . [I]t is the well settled law of this jurisdiction that the nature of retirement provisions . . . is that of deferred compensation for services actually rendered in the past.") (citations omitted), and does not alter the fact that nothing in the federal precedents blurs the clearly established contours of the rights under the federal Impairment of Contracts Clause which are set forth in the Pennsylvania cases.

In this case the provision adopted after vesting was set forth in the state constitution whereas in the cases discussed above, the provisions purporting to infringe the right to benefits were adopted by statute or ordinance. However, it was clearly established that, "[a] state can no

(continued...)

Appellants, br. at 12-13, argue that despite these cases clearly holding that retroactive denials of previously vested rights to retirement benefits unconstitutionally impair a contractual obligation to pay those benefits, the contours of Larsen's rights were not clearly established because cases analyzing impairments of contract have held that a finding of a "technical impairment is merely a preliminary step in resolving the more difficult question of whether that impairment is permitted under the Constitution," *United States Trust Co. v. New Jersey*, 431 U.S. 1, 21, 97 S. Ct. 1505, 1517 (1976) (citations and internal quotations omitted), and therefore have analyzed the nature, purpose, and extent of the impairment in light of the public interests at stake. *See Association of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766, 771 (2d Cir. 1991). We find this argument unpersuasive. As of the time of appellants' decision, the Pennsylvania Supreme Court had considered and rejected the argument that public interests in sanctioning official misconduct warranted retroactive impairment of vested rights. The court held that,

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11. (...continued)
more pass a law violating the obligation of a contract by means of a convention than by its legislature, so a provision in a state constitution which prohibits the enforcement of a contract is void." *Fisk v. Police Jury of Jefferson*, 116 U.S. 131, 135, 6 S.Ct. 329, 331 (1885) (citations omitted); *accord McBride v. Retirement Bd. of Allegheny County*, 199 A. 130, 132-33 (Pa. 1938) ("the Contract Clause of the Federal Constitution . . . forbids impairment by the states, not only by statute, but also by amendment to . . . the State Constitution") (citations omitted). Moreover, nothing in the cases addressing retroactive statutory impairments of vested rights suggests that their holdings turn on the source of the retroactive law. Thus, the contours of the right against retroactive impairment were clearly established when appellants terminated Larsen's benefits despite the lack of "precise factual correspondence" between this case and those where the subsequently enacted provision was statutory. *See Pro*, 81 F.3d at 1292.

"any argument predicated upon a compelling state interest must necessarily fail when applied to this attempted retroactive forfeiture" of previously vested retirement benefits. *See Zimmerman*, 461 A.2d at 598.[12] Thus, officials charged with administering a retirement benefits plan could not reasonably have believed, in light of the decided cases construing the scope of the Impairment of Contracts Clause, that the balance of interests rendered the impairment of Larsen's rights lawful.

Based on the cases discussed above, we find that Larsen, by alleging that he was deprived of previously vested rights pursuant to a provision adopted after vesting, has alleged a violation of clearly established rights under the Impairment of Contracts Clause of which reasonable officials charged with administering retirement benefits would have known.[13]

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12. The court explained that benefit forfeiture provisions are powerless to deter official misconduct that occurred before their enactment. *See* 461 A.2d at 598. The misconduct leading to Larsen's removal occurred well before the 1993 adoption of the amended section 16, bringing this case squarely within the rationale of Zimmerman's holding that the public interest in enforcing benefit forfeiture provisions did not outweigh the constitutional interests in protecting vested contractual rights to retirement benefits against retroactive impairment.

13. Appellants also contend that they are entitled to qualified immunity because it was not clearly established that retirement medical benefits were to be treated in the same manner as other forms of retirement benefits. *See* br. at 11-12. We reject this contention. It was clearly established that "the nature of retirement provisions . . . is that of deferred compensation for services actually rendered in the past." *Zimmerman*, 469 A.2d at 142-43 (citations omitted). Retirement medical benefits, like other retirement benefits, are an item of economic value offered in return for work performed, and thus fall squarely within the principles set forth in the cases discussed above. Indeed, to accept appellants' argument we would have to close our eyes to what we know in this era of high medical

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We hold, therefore, that appellants are not entitled to qualified immunity as to Larsen's claim that their termination of his medical benefits unconstitutionally impaired his contractual right to those benefits.

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13. (...continued)
costs, that medical benefits are of crucial importance to retired employees. Moreover, while the Pennsylvania Supreme Court had not applied this rule in the precise context of medical benefits, it had indicated in dictum that it would do so. *See, e.g., In re Upper Providence Police Delaware County Lodge No. 27*, 526 A.2d 315, 322 n.6 (Pa. 1987) (citing deferred compensation cases for the proposition that denial of medical benefits would "pose serious constitutional problems"); *Lower Merion Fraternal Order of Police Lodge v. Lower Merion Township*, 512 A.2d 612, 619 (Pa. 1986) (noting that three justices of equally divided court would treat medical benefits like any other form of deferred compensation while three justices would resolve case on grounds that did not implicate the issue). Thus, despite the lack of a precedent "directly on point," the law was sufficiently clearly established that a reasonable official would have known that an action that was unlawful as to other forms of retirement benefits also would be unlawful as to retirement medical benefits. *See Acierno*, 40 F.3d at 620. In holding that retroactive application of a provision adopted after vesting violates rights of which a reasonable official charged with administering retirement benefits would have known, we recognize that Larsen alleges that both Supreme Court justices and court administrators participated in the decision to deny his benefits. Although, under certain circumstances, a reasonable judicial officer might be held to more stringent standards than a reasonable court administrator, the cases proscribing retroactive divestment of vested rights are sufficiently clear that any reasonable official, whether judicial or administrative, charged with administering a retirement benefits program should have known of this proscription. We also recognize that the judicial officers and court administrators may have played different roles in the decision to deny Larsen's benefits. However, at this juncture, the pleadings do not elucidate the nature of each appellant's participation in the challenged decision. Accordingly, we address only the principles of law of which reasonable officials in any of the appellants' positions should have known in participating in a decision to deny vested benefits.

C. Due Process

The Due Process Clause provides that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Larsen claims that appellants violated his due process rights by terminating his medical benefits as they did so without providing him notice and either a pre- or post-revocation hearing. Br. at 22. Appellants answer that, because Larsen had no clearly established property interest in medical benefits for retired members of the judiciary, their cancellation of Larsen's benefits did not violate clearly established rights under the Due Process Clause of which a reasonable official would have known. Appellants, however, do not deny that if Larsen had a property interest in his medical benefits he was entitled to some sort of hearing with respect to their termination. *See, e.g., McDaniels v. Flick*, 59 F.3d 446, 453-61 (3d Cir. 1995).

For the purposes of the Due Process Clause, property interests are defined by state law. *See Board of Regents v. Roth*, 408 U.S. 564, 569, 577, 92 S.Ct. 2701, 2709 (1972); *Kelly v. Borough of Sayreville*, 107 F.3d 1073, 1077 (3d Cir. 1997). Larsen contends that he had a clearly established property right to the benefits associated with his office, since he had a contractual right to those benefits, and it was "clearly established that contractual rights are property interests under the Due Process Clause of the Fourteenth Amendment." Br. at 22. We find merit in this argument because it is clear that a contract right is a "form of property." *United States Trust Co.*, 431 U.S. at 19 n.16, 97 S.Ct. at 1516 n.16. Thus, inasmuch as "in Pennsylvania . . . the nature of retirement provisions for public employees is that of deferred compensation for services actually rendered in the past," *Zimmerman*, 461 A.2d 597, Larsen had a property interest in his right to medical benefits

that was sufficiently clear that appellants should have understood that the termination of those benefits triggered Larsen's right under the Due Process Clause to an opportunity to be heard regarding his claim of entitlement to those benefits. *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039.[14]

Appellants contend that even if Larsen had a clearly established property interest in his medical benefits "a reasonable state official would be justified in concluding that Larsen received all the process to which he was entitled before the cancellation of his health care benefits." Br. at 15-16. Specifically, appellants argue that Larsen had ample opportunity to challenge his impeachment in the Senate, his criminal conviction in the state courts, and his suspension by the Court of Judicial Discipline. Id. at 15. We reject this argument because, while these proceedings allowed Larsen to contest the basis for his suspension and removal from office, none of them afforded him an opportunity to address the distinct issue of whether medical benefits lawfully could be terminated as a result of that suspension and removal. Since Larsen was not afforded an opportunity to be heard regarding the propriety of terminating his medical benefits, reasonable officials could not have believed that Larsen received the process he was due in connection with a deprivation of a clearly

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14. Appellants contend that since the Pennsylvania Supreme Court had held that elected public officials have no constitutionally protected property interest in their elected public office, *See In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 609 A.2d 132 (Pa. 1992), it was reasonable for them to infer that there was no constitutionally protected right to the benefits associated with that public office. Br. at 15. We disagree. A holding than an elected official does not have a property right in his office is completely distinguishable from the situation at hand which involves deferred compensation for services rendered.

established property right. Accordingly, appellants are not entitled to qualified immunity with respect to Larsen's due process claim.[15]

D. Equal Protection

Appellants contend that they are entitled to qualified immunity as to Larsen's claim that the denial of his medical benefits violated his rights under the Equal Protection Clause, which provides that "[n]o state shall. . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. We agree. Larsen asserts that he was denied equal protection of the law because he was denied retirement benefits following his removal from office, whereas judges who had been removed for misconduct in the past had received such benefits notwithstanding their removal. Since Larsen does not allege that appellants violated a fundamental right or relied on a suspect or quasi-suspect classification, their actions, in order to comport with the Equal Protection Clause, need have only a rational relationship to a legitimate state interest. *See Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1113 (3d Cir.), *cert. denied*, 118 S.Ct. 435 (1997); *Dyszel v. Marks*, 6 F.3d 116, 125 (3d Cir. 1993).[16]

According to appellants, reasonable officials could believe that they had a rational basis for treating Larsen

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15. We do not find it necessary to address the question of what opportunity to be heard should have been afforded Larsen as appellants offered him no such opportunity at all either before or after Frankforter's June 17, 1994 letter.

16. Suspect classifications involve traits such as race, national origin, or alienage, while quasi-suspect classifications involve traits such as gender. *See Dyszel*, 6 F.3d 125 n.13.

differently from judges removed in the past, since there had been an intervening constitutional amendment which served the rational and legitimate objective of preventing "officials who have been removed from office for breaching the public's trust from benefitting from the . . . public purse." Br. at 17. We agree and in fact are satisfied that Larsen's equal protection claim does not adequately allege a violation of a constitutional right at all and thus does not satisfy the first prong of the Siegert test. *See* 500 U.S. at 232, 111 S.Ct. at 1793. The Equal Protection Clause does not require identical treatment of all individuals, but rather permits differential treatment of individuals who are differently situated in some relevant respect. *See Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331 (1992). Thus, individuals who are differently situated in terms of their "legitimate expectation and reliance interests" rationally may be subjected to different rules designed to afford greater protection to those with heightened legitimate expectations. *Id.* at 13 (citations omitted) (upholding imposition of greater tax burden on those who acquired property after change in tax law based on their lesser expectation interests as compared to those who owned property before change in law). Because Larsen was removed from office at a time when the Pennsylvania Constitution provided for denial of benefits upon removal, his position was different from that of judges who were removed when no such provision existed.[17] Accordingly, there was a

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17. The difference in the law at the time of removal creates a distinction which a reasonable official could believe was a rational basis, under the Equal Protection Clause, for treating Larsen differently from the judges removed before 1993, thus entitling appellants to qualified immunity under the second prong of the *Siegert* analysis even if Larsen's allegations satisfied the first prong. While a reasonable official could believe that the 1993 constitutional amendment created a distinction between different judges depending on their status at the time of its

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rational basis for treating Larsen differently from judges removed from office before the 1993 constitutional amendment, and appellants are entitled to dismissal of Larsen's equal protection claim.

E. First Amendment

Larsen contends that appellants' revocation of his benefits violated his right of free speech under the First Amendment because it was a form of retaliation for his protected speech in alleging misconduct on the part of his fellow Supreme Court justices. To state a claim for actionable retaliation under the First Amendment, the plaintiff must allege facts which, if proven, would establish that the plaintiff 's protected First Amendment activity was a "substantial or motivating factor in the alleged retaliatory action." *Feldman v. Philadelphia Hous. Auth.* , 43 F.3d 823, 829 (3d Cir. 1994). This rule is derived from the Supreme Court's opinion in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 576 (1977).

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17. (...continued)
adoption, which provided a "rational basis" for differential treatment within the meaning of the equal protection jurisprudence, as discussed in Part III. B 2, supra, a reasonable official could not believe that the 1993 amendment may be applied retroactively to deny previously vested rights, as the impairment of contracts jurisprudence clearly proscribes such retroactive impairments. Because of the divergent standards under these distinct constitutional provisions, we find that reasonable officials could believe that the decision to deny Larsen's benefits did not violate clearly established equal protection principles but could not believe that this decision did not violate clearly established impairment of contracts principles.

In support of their assertion that they are entitled to qualified immunity as to Larsen's First Amendment claim, appellants contend, br. at 18-19, that they could have believed that their decision to revoke Larsen's benefits was not unconstitutionally retaliatory because they could have believed that they were required to apply the 1993 version of section 16, and thus that they would not be liable under the First Amendment as they would have reached the same decision "'even in the absence of the protected conduct.'" *Givhan v. Eastern Line Consol. Sch. Dist.*, 439 U.S. 410, 416, 99 S.Ct. 693, 697 (1979) (quoting *Mount Healthy v. Doyle*, 429 U.S. at 287, 97 S.Ct. at 576). Appellants' argument requires the court to apply the objective reasonableness standards of the qualified immunity doctrine to the subjective element of a First Amendment retaliation claim, and thus calls for the somewhat illogical inquiry into "whether a person reasonably could have thought that he in fact thought something." *Sheppard v. Beerman*, 94 F.3d 823, 828 (2d Cir. 1996).

The qualified immunity analysis requires a determination as to whether reasonable officials could believe that their conduct was not unlawful even if it was in fact unlawful. *See In re City of Philadelphia Litig.*, 49 F.3d at 961 n.14. In the context of a First Amendment retaliation claim, that determination turns on an inquiry into whether officials reasonably could believe that their motivations were proper even when their motivations were in fact retaliatory. Even assuming that this could be demonstrated under a certain set of facts, it is an inquiry that cannot be conducted without factual determinations as to the officials' subjective beliefs and motivations, and thus cannot properly be resolved on the face of the pleadings, but rather can be resolved only after the plaintiff has had an opportunity to adduce evidence in support of the allegations that the true motive for the conduct was

retaliation rather than the legitimate reason proffered by the defendants. *See Sheppard*, 94 F.3d at 828-29.[18]

According to Larsen's allegations, which we must accept as true for purposes of this appeal from an order entered on the pleadings, the true motive for appellants' decision was retaliation for his protected speech. *See* app. at 72-73; 96-97. Appellants may be able to establish by the end of discovery that their decision in fact rested on a good faith belief, which they would have formed even in the absence of any protected speech, that they were to required to revoke Larsen's benefits under the 1993 version of section 16. However, at this juncture, we must accept Larsen's allegations that their true reasons were retaliatory, allegations which state a claim for violation of clearly established rights under the First Amendment, precluding dismissal on qualified immunity grounds. *See Walker v. Schwalbe*, 112 F.3d 1127, 1133 (11th Cir. 1997) (rejecting assertion of qualified immunity on grounds that defendants' proffer of non-retaliatory reason created factual dispute as to "true reason" for the adverse action and did not defeat claim for violation of clearly established right against retaliatory action); *See also Azzaro v. County of Allegheny*, 110 F.3d 968, 981 (3d Cir. 1997) (holding that assertion of non-retaliatory reason which would have justified decision even in absence of protected activity created factual issue precluding summary judgment as to retaliation claim).

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18. In this respect the qualified immunity analysis as to a First Amendment retaliation claim differs from the qualified immunity analysis as to claims under the Impairment of Contracts or Due Process Clause, which requires only an objective analysis of whether reasonable officials could believe that the challenged actions conformed to objective standards of conduct.

In reaching this result we are not suggesting that a bare allegation of retaliatory motive necessarily is sufficient to defeat an assertion of qualified immunity as to a retaliation claim. In some circumstances, the legitimate basis for the actions might be so apparent that the plaintiff's allegations of retaliatory motive could not alter the conclusion that under the circumstances alleged in the pleadings, the defendants would have been compelled to reach the same decision even without regard for the protected First Amendment activity. In this case, however, appellants were faced with a decision as to whether to subject Larsen to the more adverse 1993 version of section 16, a decision whose outcome, under the circumstances alleged by Larsen, could have been affected by a retaliatory motive.[19] Thus we cannot conclude from the face of the pleadings that appellants would have taken the same action in the absence of protected speech. Accordingly, appellants are not entitled, at this preliminary stage of the litigation, to qualified immunity as to Larsen's First Amendment retaliation claim.

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19. To defeat a First Amendment retaliation claim if a plaintiff demonstrates that his protected First Amendment activity was a substantial or motivating factor for the retaliatory action, a defendant must establish not merely that he "could properly" have taken the same adverse action based on an independent "legally sufficient" reason, but also that he "would have" done so in the absence of protected conduct. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1075 (3d Cir. 1990). The mere fact that the 1993 version of section 16 provided for termination of benefits upon removal would not defeat Larsen's retaliation claim if he could demonstrate that appellants decided to apply that provision, rather than the more lenient version of section 16 that existed at the time of vesting, due to retaliatory animus.

F. Public Health Services Act

Appellants contend that they are entitled to qualified immunity as to Larsen's claim that the termination of his benefits violated his rights under the Public Health Services Act, 42 U.S.C. SS 300bb-1 et seq. ("PHSA"). The PHSA provides that state-operated group health plans must offer 18 months of continuing coverage to qualified beneficiaries who otherwise would lose coverage as a result of a "qualifying event." 42 U.S.C. §§ 300bb-1(a), 300bb-2(2). The PHSA defines the term "qualifying event" to include "termination (other than by reason of [the] employee's gross misconduct)." Section 300bb-3(2).

Appellants contend that Larsen did not have a clearly established right to continuing coverage under the PHSA, because reasonable officials could believe that Larsen's termination was not a "qualifying event" within the meaning of the PHSA entitling him to elect continuing coverage. According to appellants, reasonable officials could conclude that Larsen's termination was "by reason of . . . gross misconduct," thus excluding his termination from the definition of a "qualifying event" under section 300bb-3(2), and rendering him ineligible for coverage under section 300bb-1(a). In support of their argument that Larsen's termination reasonably could be viewed as a termination "by reason of . . . gross misconduct," appellants emphasize that Larsen had been convicted of two felony counts, removed from office by the Court of Common Pleas as part of his criminal sentence, suspended from office by the Court of Judicial Discipline for his criminal conduct which that court found had undermined public confidence in the judiciary, and called before the Senate on a writ of impeachment summons. Br. at 20-21.

Neither the PHSA, nor the comparable statute applicable to private employers, defines the term "gross misconduct." *See* 42 U.S.C. SS 300bb-1 et seq.; 29 U.S.C. § § 1161 *et seq.*[20] Moreover, as of the time appellants decided to terminate Larsen's benefits, the cases construing these provisions had not set forth a clear definition of "gross misconduct" under the PHSA.[21] These cases, however, had applied the standard to conduct which reasonable officials could believe was no more egregious than Larsen's conduct in unlawfully procuring controlled substances through the use of his subordinates. *See, e.g., Burke v. American Stores Employee Benefit Plan*, 818 F. Supp. 1131 (N.D. Ill. 1993) (holding that use of improperly procured promotional discount vouchers to obtain free products from employer's retail outlets constituted gross misconduct); *Adkins v. United Int'l Investigative Servs., Inc.*, 1993 WL 345186 (N.D. Cal. 1993) (holding that leaving post unattended and falsifying records to receive additional paychecks constituted gross misconduct); *Conery v. Bath Assocs.*, 803 F. Supp. 1388, 1396 (N.D. Ind. 1992) (holding that misappropriation of funds constituted gross misconduct). We are satisfied from these cases and from the language of the PHSA that Larsen has not adequately alleged a violation of the

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20. The analogous provision governing private employers is set forth in the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), 29 U.S.C. § 1161(a), which requires the employer to offer continuing coverage to employees who otherwise "would lose coverage under the plan as a result of a qualifying event."

21. In *Burke v. American Stores Employee Benefit Plan*, 818 F. Supp. 1131, 1135 (N.D. ill. 1993), the court, applying 29 U.S.C. § 1161(a), noted that, "[t]here is little direct statutory or judicial guidance on the meaning of 'gross misconduct.'" While the *Burke* court looked to Illinois state law for guidance, we have not made any comparable state-law analysis.

PHSA and thus his complaint with respect to that statute does not pass muster under the first prong of a *Siegert* analysis. Moreover, even if it did, because a reasonable official could believe that the acts which resulted in Larsen's termination amounted to gross misconduct, it was not clearly established that Larsen's termination was a "qualifying event" triggering his right to coverage under the PHSA.

Larsen contends that, regardless of the egregiousness of his conduct, it cannot be characterized as "gross misconduct" under the PHSA because it did not occur "within the scope of his employment as an associate justice." Br. at 26-27. However, nothing in the statutory language or relevant case law clearly establishes, or even suggests, that "gross misconduct" under the PHSA must occur within the scope of employment. Accordingly, it appears that a reasonable official applying the plain language of the PHSA could conclude that any termination which occurred "by reason of [the] employee's gross misconduct" would fall within the exception to section 300bb-3(2) and thus would not constitute a "qualifying event" entitling the employee to continuing coverage, regardless of whether the conduct occurred within the scope of employment.[22] Because Larsen did not adequately allege a

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22. Even if it were clearly established that"gross misconduct" encompassed only misconduct within the scope of employment, a reasonable official could believe that Larsen's conduct was sufficiently related to his employment to satisfy such a requirement. As the district court noted, 955 F. Supp. at 1581 & n.33, the criminal misconduct which led to Larsen's removal from office involved Larsen's use of his subordinates and his state employees' prescription plan to procure prescription medications unlawfully. Absent some authority to the contrary, reasonable officials could conclude that this nexus between Larsen's misconduct and his employment would satisfy any requirement

(continued...)

violation of the PHSA and because, therefore, there was no clearly established law indicating that Larsen's termination was a qualifying event under section 300bb-3(2), appellants are entitled to qualified immunity as to Larsen's claim under the PHSA.

IV. CONCLUSION

For the foregoing reasons, we hold that Larsen's complaint alleges violations of clearly established rights under the Impairment of Contracts Clause, the Due Process Clause, and the First Amendment. Therefore, appellants are not entitled to qualified immunity with respect to those claims and, accordingly, we will affirm the district court's denial of their motion to dismiss those claims on qualified immunity grounds. However, Larsen's complaint fails to allege violations of his rights under the Equal Protection Clause or the Public Health Services Act. We therefore will reverse the denial of appellants' motion to dismiss those claims and on remand the district court should dismiss those claims on qualified immunity grounds. In summary, we will affirm in part, will reverse in part, and will remand this case to the district court for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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22. (...continued)
in that regard.

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

ROLF LARSEN, Plaintiff

v.

SENATE OF THE COMMONWEALTH OF
PENNSYLVANIA, et al., Defendants

CIVIL ACTION NO. 1:CV-95-1540

955 F. Supp. 1549

February 28, 1997, FILED

SYLVIA H. RAMBO, Chief Judge, Middle District of Pennsylvania

MEMORANDUM

I. Introduction

Before the court is a plethora of motions. There are four separate motions to dismiss filed on behalf of: (1) Defendants Senate of Pennsylvania and the individual Senators, (2) Defendants Judicial Conduct Board ("JCB") and individual Judicial Conduct Board members, (3) Defendants Court of Judicial Discipline ("CJD") and its individual members, (4) Defendants Supreme Court of Pennsylvania and the individual justices thereof, and (5) Defendants Administrative Office of the Pennsylvania Courts, Nancy Sobolevitch, and David Frankforter. In addition, also pending before the court

are the Senate Defendants' motion for costs pursuant to Federal Rule of Civil Procedure 41(d) and to strike portions of the amended complaint and the JCB Defendants' motion for sanctions under Rule 11. Furthermore, on July 15, 1996, Plaintiff Larsen filed a motion for partial summary judgment. In light of Defendants' pending motions, on July 29, 1996, the court stayed briefing on plaintiff's motion. This memorandum and accompanying order will dispose of all motions presently pending before the court except for Larsen's motion for partial summary judgment.

II. Procedural and Factual History

Plaintiff Larsen is a former Justice of the Pennsylvania Supreme Court. Larsen was initially elected to the Supreme Court for a ten-year term commencing in January 1978. He was reelected for a second term beginning in 1988. This case arises out of Larsen's removal from office in October 1993 based on allegations that he engaged in criminal activity. Larsen was removed from office by order of the Pennsylvania Supreme Court on October 28, 1993, convicted on April 9, 1994 on two counts of criminal conspiracy under the Controlled Substances Act, impeached by the Senate on October 4, 1994, and removed from his position by the CJD on June 3, 1994. In this action, Larsen sues virtually every entity and individual which played a role in his removal from office. He claims, generally, various due process, First Amendment, and equal protection violations in the removal procedures afforded him. Larsen alleges the following facts in support of his claims.

In or around 1988, the Judicial Inquiry and Review Board ("JIRB") charged Larsen with several violations of

Article 5, Section 17(b) of the Pennsylvania Constitution.[1] Section 17(b) provides that "justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court." Pa. Const. art. 5, § 17(b). The JIRB investigated Larsen and on July 17, 1991 issued a report to the Supreme Court of Pennsylvania in which it found that Larsen, acting without improper motive, had created an appearance of impropriety by meeting ex parte with a trial judge presiding over a case pending in the Allegheny County Court of Common Pleas. The JIRB recommended that Larsen be publicly reprimanded. *In re Larsen*, 532 Pa. 326, 616 A.2d 529 (Pa. 1992). On October 14, 1992, the Supreme Court by Justices Zappala and Cappy, with Justice Papadakos dissenting, issued an order per curiam without opinion adopting the JIRB's report and recommendation. *Id.*

On November 24, 1992, Larsen served a petition for the disqualification and recusal of Justices Zappala and Cappy. Larsen served a "supplemental" petition on December 14, 1992, and a second "supplemental" petition on January 7, 1993. In his petitions, Larsen raised issues of partiality and improper motivation on the part of Justices Zappala and Cappy during the JIRB's investigation of him and in deciding to adopt the JIRB's report and recommendation. Larsen requested that Justices Zappala and Cappy recuse themselves or, in the alternative, that they be disqualified from considering the JIRB's report and recommendation. Larsen also accused Chief Justice Nix of acting improperly by interfering in a pending trial in Lehigh County, and interfering in the defendant's petition for allowance of appeal in that case.

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1. The JIRB is the predecessor of the JCB.

In response to Larsen's allegations, former attorney general Earnest Preate, Jr. appointed two special counsels to investigate Larsen's claims. Over the course of 1993, a grand jury heard testimony regarding Larsen's allegations as well as the JIRB's accusations against Larsen. The grand jury ultimately found two areas of alleged misconduct by Larsen: (1) that he systematically maintained a list of petitions for allowance of appeal to be given special handling by his staff, and (2) that he regularly obtained prescription medications for his own use by causing a physician to issue prescriptions in the names of members of his staff.

On October 22, 1993, the grand jury recommended that criminal charges be brought against Larsen for his procurement of prescription drugs in the name of his staff members. On October 28, 1993, Larsen was charged with criminal conspiracy and multiple violations of the Controlled Substances Act. That same day, the Pennsylvania Supreme Court relieved Larsen "of any and all judicial and administrative responsibilities as a justice." (Defs.' Ex. B.) Larsen continued to receive his salary.

In January 1993, while the grand jury was deliberating, Representative Christopher K. McNally filed a petition in the Pennsylvania House of Representatives calling for Larsen's impeachment based on alleged violations of the Code of Judicial Conduct. On November 5, 1993, the grand jury's report was made public. The grand jury report formed the basis for the Pennsylvania House of Representative's and the JCB's investigation of Larsen. The House Judiciary Committee requested and obtained copies of the transcripts of witnesses' testimony and exhibits presented to the grand jury. On November 23, 1993, the House adopted House Resolution No. 205 authorizing the House Judiciary Committee to investigate

Larsen's conduct. The House Judiciary Subcommittee on Courts held public hearings in conjunction with its investigation into the allegations against Larsen.

On April 9, 1994, after a five day trial in the Allegheny Court of Common Pleas, a jury convicted Larsen of two counts of criminal conspiracy under the Controlled Substances Act. Thereafter, on April 22, 1994, the House Subcommittee voted to recommend to the entire House a resolution to impeach Larsen. On May 18, 1994, House Resolution 324 was introduced listing seven articles of impeachment against Larsen and on May 24, 1994 the House adopted Resolution 324.[2]

On June 6, 1994, the Senate received the articles of impeachment from the House Managers and pursuant to Article

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2. The articles of impeachment accused Larsen, generally, of "misbehavior in office." Specifically, the articles of impeachment charged Larsen with: (1) tracking petitions for allowance of appeal to the Supreme Court of Pennsylvania so that these petitions could be specially handled by members of his staff -- these petitions received special treatment because counsel of record were friends of and made political contributions to Larsen; (2) communicating ex parte with an attorney who was a friend and political supporter of Larsen in cases in which he had petitions for allowance of appeal pending before the Supreme Court and voting consistent with the positions being advocated by that attorney; (3) lying before the grand jury that was investigating him; (4) communicating with an Allegheny County Court of Common Pleas judge regarding a civil case before that judge and providing extra-record information to that judge potentially beneficial to a litigant in that matter represented by a friend of Larsen's; (5) making bad faith allegations with a reckless disregard for the truth against Justices Zappala and Cappy in his petition and supplemental petitions for their disqualification and recusal; (6) obtaining prescription drugs in the name of his staff for his own use; and (7) undermining confidence in the integrity and impartiality of the judiciary and betraying the trust of the people of Pennsylvania. (Defs.' Ex. G.)

10 of the Senate Rules of Practice and Procedure for impeachment trials, appointed a committee of six senators ("the Senate committee") to conduct evidentiary hearings regarding the allegations against Larsen.[3] Senator Robert Jubelirer, President Pro Tempore of the Senate, appointed Senators Stewart Greenleaf, Charles Lemmond, H. Craig Lewis, Jeannette Reibman, Tim Shaffer, and Hardy Williams to the committee. On June 20, 1994, Larsen filed an answer with new matter to the articles of impeachment. On June 30, 1994, Larsen filed an omnibus pretrial motion with the Senate, requesting that the Senate dismiss the action of the Senate committee and that his impeachment trial be held before the full Senate. Larsen also moved for a pretrial hearing before the full Senate, discovery, the recusal of certain Senators, a continuance, and the payment of attorney's fees and costs.

On August 8, 1994, the Senate committee commenced evidentiary hearings on the articles of impeachment. The committee concluded hearings on September 9, 1994. On September 20, 1994, the full Senate heard oral argument on Larsen's pretrial motions and subsequently voted without debate to deny all of his motions.

On September 27, 1994, the full Senate convened and heard closing arguments by the House Managers and Larsen's counsel. Simultaneously, the Senate committee for the first time provided the individual Senators and Larsen's counsel with a copy of its final report. The report contained a summary of evidence presented at the hearings.

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3. Pursuant to the Pennsylvania Constitution, the House of Representatives possesses exclusive authority to impeach. Pa. Const. art. 6, § 4. The constitution further provides that "all impeachments shall be tried by the Senate." Pa. Const. art. 6, § 5.

On October 4, 1994, the Senate voted on the seven articles of impeachment. The Senate voted forty-four to five to convict Larsen on article II. Article II charged Larsen with engaging in an ex parte communication with an attorney who was a friend and political supporter of his regarding two petitions for allowance of appeal the attorney had pending before the Pennsylvania Supreme Court. At Larsen's request, the attorney indicated the position he was advocating in each case. Larsen ultimately voted in accordance with the attorney's stated positions. The Senate voted to acquit Larsen on the other six articles. The Senate then voted unanimously to bar Larsen from holding any office of trust or profit in Pennsylvania in the future.

At the same time the House and Senate were proceeding against Larsen, the JCB was also investigating the allegations against him. The JCB is a twelve member board formed pursuant to Article 5, Section 18 of the Pennsylvania Constitution to investigate allegations of judicial misconduct. Pa. Const. Art. 5, § 18. In appropriate circumstances, the JCB may file a formal complaint with the CJD. The CJD is an eight member state administrative tribunal formed pursuant Article 5, Section 18(b) of the Pennsylvania Constitution to hear and determine charges of judicial misconduct. In January 1994, the JCB wrote Larsen and notified him that it was instituting an investigation into all of his activities as a Supreme Court Justice. On March 10, 1994, JCB filed an application with the CJD for an interim order directing the suspension of Larsen with pay, on the basis that Larsen had been charged with a felony in the Allegheny Court of Common Pleas. The JCB requested that if and when Larsen was convicted, that his suspension be automatically converted to a suspension without pay.

On or about March 20, 1994, Larsen filed an answer with new matter to the JCB's application. On March 25, 1994, the CJD denied the JCB's application.

On April 9, 1994, an Allegheny Court of Common Pleas jury convicted Larsen on two felony counts. On April 18, 1994, the JCB filed a second application to suspend Larsen without pay. In support of its application, the JCB averred Larsen's conviction on criminal charges in the Allegheny Court of Common Pleas. Larsen had yet to be sentenced and had appealed his convictions. On May 5, 1994, Larsen filed an answer and new matter to the JCB's application. On May 16, 1994, the JCB filed a response to new matter. The CJD conducted a hearing on the JCB's second application on May 25, 1994. Exhibits regarding Larsen's criminal information and jury verdicts were admitted into evidence. Larsen's counsel moved to bifurcate the hearing to permit him to introduce testimony at a later date. The CJD denied the motion. On June 3, 1994, the CJD granted the JCB's application for an interim order suspending Larsen without pay. Thereafter, on June 6, 1994, the JCB filed a formal complaint against Larsen with the CJD.[4]

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4. The amended complaint is unclear in delineating the charges against Larsen raised in the JCB's formal complaint. Paragraph ninety of the amended complaint asserts that "on June 6, 1994, the JCB filed with the CJD, 'Board Complaint - Formal Charges' against Justice Larsen, alleging, among other things, matters alleged in his petitions for the disqualification and recusal of Justice Zappala and Justice Cappy." (Am. Compl. P 90.) Since Larsen's petitions for the disqualification of Justices Zappala and Cappy contained allegations against them and not against Larsen, the court presumes Larsen to allege that the JCB complaint charged him with making false statements in his petitions for disqualification and recusal.

Larsen instituted the present action on September 13, 1995. In response, all Defendants filed motions to dismiss, arguing various reasons why the complaint should be dismissed. On February 26, 1996, Plaintiff filed an amended complaint, thereby mooting Defendants' pending motions. Defendants again moved to dismiss the amended complaint in its entirety, alleging various procedural and substantive irregularities.

Larsen's claims against the various Defendants are too numerous to recite herein and will be discussed as necessary in the context of addressing the merits of Defendants' individual motions. Generally, Larsen alleges that in each of the proceedings which resulted in his removal from judicial office, Defendants violated his rights to due process and equal protection, and retaliated against him in violation of the First Amendment based on his statements in his petitions for the disqualification and recusal of Justices Zappala and Cappy, and his statements regarding Chief Justice Nix. Larsen seeks reinstatement, compensatory damages, monetary damages, and resumption of his medical insurance benefits.

III. Discussion

A. Law Governing Motions to Dismiss

In addressing Defendants' motions, the court is required to accept as true all of the factual allegations in the amended complaint and all reasonable inferences that can be drawn from its face. *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996); *see also Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *White v. Napoleon*, 897 F.2d 103, 106 (3d Cir. 1990). "The complaint will be deemed to have alleged sufficient facts if it adequately put[s] the defendants on notice

of the essential elements of . . . plaintiff['s] cause of action." Nami, 82 F.3d at 65. The court will not dismiss the amended complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim[s] which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-6, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

At the outset of its discussion, the court notes that several Defendants argue that Larsen's claims against them are moot in that he seeks reinstatement to the bench, a remedy which the court cannot provide as Larsen was removed from office as part of his sentence imposed by the Allegheny Court of Common Pleas following his trial. While this is true, the court notes that Larsen has appealed his criminal conviction and sentence, challenging his removal from office. On August 5, 1996, while the current motions were pending before this court, the superior court declined to entertain Larsen's challenge on appeal to his removal from office, holding that the issue was moot due to the Senate's impeachment of him. *Commonwealth v. Larsen*, 682 A.2d 783, 793-94 (Pa. Super. 1996). Because the possibility remains that the Supreme Court of Pennsylvania will hold differently and address the merits of Larsen's challenge to his sentence, the court does not find it appropriate to dismiss Larsen's claims at this time based on mootness.[5]

The court will address Defendants' arguments in support of dismissal seriatim.

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5. Although no party has so informed the court, the court presumes that Larsen will undertake further appeals of his criminal conviction and sentence.

B. Rooker-Feldman

The Senate and individual Senate Defendants argue that the court lacks jurisdiction over Larsen's claims based on the *Rooker-Feldman* doctrine. Under the *Rooker-Feldman* doctrine, district courts "lack subject matter jurisdiction to engage in appellate review of state-court determinations or to evaluate constitutional claims that are 'inextricably intertwined with the state court's [decision] in a judicial proceeding.'" *Port Auth. Police Benevolent Ass'n Inc. v. Port Auth. of New York and New Jersey Police Dep't*, 973 F.2d 169, 177 (3d Cir. 1992) (quoting District Columbia Court of Appeals v. Feldman, 460 U.S. 462, 483 n.16, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983)); *see also Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923). In addition, *Rooker-Feldman* deprives district courts of jurisdiction to hear appeals from interlocutory orders issued by lower state courts, *Port Auth.*, 973 F.2d at 177-78, and from entertaining constitutional claims that a litigant could have raised in a prior state court proceeding but chose not to, *Valenti v. Mitchell*, 962 F.2d 288, 296 (3d Cir. 1992).

A federal claim is inextricably intertwined with a claim raised in a prior state court proceeding if granting the requested relief would require the district court to overrule a prior state court judgment. *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir. 1996). Where a federal court could not grant the federal plaintiff's requested relief without reversing or modifying a previous decision of a state court, the court does not have subject matter jurisdiction to entertain the federal plaintiff's claim. *Marks v. Stinson*, 19 F.3d 873, 885 n.11 (3d Cir. 1994); *Kirby v. City of Philadelphia*, 905 F. Supp. 222, 225 (E.D. Pa. 1995).

Prior to the commencement of the Senate impeachment proceedings, on July 26, 1994, Larsen filed suit in the Pennsylvania Commonwealth Court seeking a preliminary injunction enjoining the proceedings. *Larsen v. Senate of Pennsylvania,* 166 Pa. Commw. 472, 646 A.2d 694, 695 (Pa. Commw. 1994). The Senate Defendants argue that under the *Rooker-Feldman* doctrine, Larsen's prior court proceeding and the commonwealth court's decision in that case deprive this court of jurisdiction over Larsen's claims in the instant case.

In his commonwealth court action, Larsen raised several claims similar to the ones he seeks to litigate in the present action, namely that: (1) the Senate improperly delegated to the Senate committee the responsibility for conducting the impeachment trial, (2) the Senate and Senate committee violated his due process rights by failing to grant his motion for an extension of time or rule on other of his pretrial motions, and (3) the Senate and the committee violated his rights to a fair trial and effective assistance of counsel by denying his request for payment of attorney's fees.[6] *Larsen,* 646 A.2d at 697-98. The commonwealth court declined to address the propriety of the Senate's actions, concluding that the impeachment provisions of the Pennsylvania Constitution commit the impeachment power to the Senate "to an extent which clearly bars the courts from intervening with prior restraint." *Id.* at 705. The court stated:

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6. In the commonwealth court action, Larsen also argued that: (1) his impeachment trial violated the federal constitutional prohibition against double jeopardy, (2) he was not properly subject to impeachment proceedings as the supreme court had already removed him from his position as supreme court justice, and (3) the impeachment charges against him did not amount to a constitutionally valid basis for impeachment. *Larsen,* 646 A.2d at 697-98.

> Impeachment involves an adjudicative process, but one which has been clearly set apart by the Constitution as distinguished from adjudications by the judicial branch of government, regardless of whatever powers the courts may have to interpret actions of the legislative body, by way of review, after they have been taken. As in the case of scrutinizing the constitutionality of statutes themselves, the courts clearly have no power to intervene by injunction in advance of legislative action, any more than a court would have any power to enjoin in advance, the enactment of a law appearing (to the courts) to be constitutionally invalid.

Id. (emphasis added). The court interprets the commonwealth court's decision as merely holding that it lacked the authority to issue a prior restraint upon the Senate and the Senate committee. Thus, granting the relief requested by Larsen in the instant action would not require the court to overrule the commonwealth court's prior decision. Indeed, many of the claims that Larsen raises in the present case arose out of the impeachment process itself which had not begun at the time the commonwealth court ruled on his motion for a preliminary injunction. It would have been impossible for Larsen to assert claims at that time based on events that had not yet occurred. Several of Larsen's constitutional claims arose out of the impeachment proceedings, could not have been raised prior to the impeachment trial, and, thus, cannot be considered inextricably intertwined with claims he did raise in the commonwealth court. Additionally, the commonwealth court recognized the possibility that upon conclusion of the impeachment proceedings, it might possess the power to hear Larsen's claims. *Id.* at 700, 705. The commonwealth court

appeared reluctant, however, based on the political question doctrine to make an explicit holding regarding a state court's jurisdiction to hear claims at the completion of the impeachment proceedings. *Id.* at 702-04. Therefore, even if the commonwealth court had held that the political question doctrine prohibited it from hearing Larsen's claims at the conclusion of the impeachment proceedings, granting the relief requested in the present case would not require the court to overrule the commonwealth court's decision that it was barred from entertaining Larsen's claims. Accordingly, the court will not dismiss Larsen's claims against the Senate and individual Senate Defendants based on the *Rooker-Feldman* doctrine.

C. Political Question Doctrine

The Senate and individual Senate Defendants argue that Larsen's constitutional challenge to the manner in which they conducted his impeachment trial involves a political question and that the court should decline to exercise its jurisdiction over Larsen's claims on this basis.

The political question doctrine applies "where there is 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .'" *Nixon v. United States*, 506 U.S. 224, 228, 122 L. Ed. 2d 1, 113 S. Ct. 732 (1993) (emphasis added) (quoting *Baker v. Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)). The policy behind the political question doctrine derives from the need to maintain separation of powers between coequal branches of government. *Irod v. Burns*, 427 U.S. 347, 351, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) (citing *Baker*, 369 U.S. at 217). "It is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the

federal judiciary's relationship to the States, which gives rise to the political question." *Baker*, 369 U.S. at 210 (internal quotations omitted). Thus, the political question doctrine does not prohibit the court from hearing Larsen's constitutional claims arising out of the Senate's actions. See *Bond v. Floyd*, 385 U.S. 116, 17 L. Ed. 2d 235, 87 S. Ct. 339 (1966); *Gewertz v. Jackman*, 467 F. Supp. 1047, 1055 (D.N.J. 1979).[7] The court will deny the Senate Defendants' motion to dismiss based on the application of the political question doctrine.

D. The Eleventh Amendment

Several Defendants assert that they are immune from suit pursuant to the Eleventh Amendment. Larsen has sued all

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7. The Senate and individual members concede that "although in its purest form, the so-called 'political question doctrine' applies only in cases involving the relationship between the federal judiciary and a co-equal branch of the federal government . . . this Court's inquiry cannot stop there." (Senate Br. in Supp. at 23.) Neither of the cases cited by Defendants support the extension of the political question doctrine to cases where a federal court is asked to review the constitutionality of actions by a state legislature. Although Defendants quote a rather lengthy passage from the Supreme Court's decision in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982), in which the Court talks about leaving the states free to perform inherent state functions, Defendants omit from their citation an internal quotations to *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). The Court's citation to *Younger* reveals that the passage addresses the appropriateness of abstention and offers nothing regarding the applicability of the political question doctrine. Likewise Defendant cite *Davids v. Akers*, 549 F.2d 120 (9th Cir. 1977), suggesting that it provides support for their contention that the political question doctrine precludes the court from addressing Larsen's claims. However, the Ninth Circuit in *Davids* explicitly held that the political question doctrine does not apply to the federal judiciary's relationship to the states and addressed the merits of the plaintiffs' claims. *Id.* at 123-27.

Defendants in their official and personal capacities. (Compl. P 13.) Specifically, Larsen asks the court to grant judgment in his favor:

> (1) against the Senate and Senators in their official capacities, granting declaratory and injunctive relief, voiding the Senate impeachment verdict of guilty of Article II;
>
> (2) against the Senators in their personal capacities, awarding damages including loss of past and future wages and benefits, emotional harm, injury to reputation, and counsel fees;
>
> (3) against the Supreme Court, . . . Judicial Conduct Board, and all individual members, in their official capacities, granting declaratory and injunctive relief: (i) voiding the Court of Judicial Discipline's order dated June 3, 1994, of suspension without pay; (ii) voiding the appointments to the Judicial Conduct Board and the Court of Judicial Discipline; and (iii) voiding the action of interfering with plaintiff's right to practice law;
>
> (4) against the Supreme Court, Court of Judicial Discipline . . . and all members in their personal capacities, awarding damages, including loss of past and future wages and benefits,

emotional harm, injury to reputation, and counsel fees;

(5) against the Supreme Court and individual justices and Administrative Office and individual members in their official capacities, granting declaratory and injunctive relief, voiding the action of terminating plaintiff's health and medical benefits;

(6) against the Supreme Court and individual justices and Administrative Office and individual members in their personal capacities. awarding damages for medical expenses incurred by plaintiff from June 4, 1994, to date; and,

(7) against all individual defendants in their personal capacities for punitive damages and other such relief as the court may find appropriate.

(Compl. at 29-30.)

"In the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984). This jurisdictional bar applies regardless of whether the plaintiff is seeking equitable relief or monetary damages. *Papasan v. Allain*, 478 U.S. 265, 276, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986); *Pennhurst*, 465 U.S. at

100-01. Additionally, suits against state officials will be deemed suits against the state and barred by the Eleventh Amendment if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Pennhurst*, 465 U.S. at 101 n.11 (quoting *Dugan v. Rank*, 372 U.S. 609, 620, 10 L. Ed. 2d 15, 83 S. Ct. 999 (1963) (internal quotations omitted)). The one well-known exception to this rule is where a suit challenges the constitutionality of a state official's conduct. *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). The Supreme Court has narrowly applied *Young's* exception. *Pennhurst*, 465 U.S. at 102. In *Edelman v. Jordan*, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974), the Court held that federal courts may award prospective injunctive relief to plaintiffs challenging the constitutionality of a state official's conduct. "Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex Parte Young*, gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interests in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985).

The Senate, the Supreme Court, and the CJD argue that Larsen's claims against them are in effect claims against the Commonwealth of Pennsylvania and are, therefore, barred by the Eleventh Amendment. The court agrees and will dismiss all claims asserted against the Senate, Supreme Court, and the CJD.

Larsen appears to contest only mildly the contention that his suit against the Senate is a suit against the Commonwealth

of Pennsylvania for Eleventh Amendment purposes. Other than citing *Liveright v. Joint Comm. of Tenn. Gen. Assembly*, 279 F. Supp. 205, 211 (M.D. Tenn. 1968) in support of his claim that "[a] legislative body is not immune from suit for injunctive relief," Pl.'s Br. in Oppos. at 20, he does not dispute that his suit against the Senate is a suit against the Commonwealth.[8] Although the court in *Liverlight* did not address the question of whether a legislative body was immune from suit pursuant to the Eleventh Amendment, Larsen asks the court to presume it stands for such a proposition based on the district court's award of injunctive relief against the committee. The court declines to adopt such a theory.

Moreover, Larsen misunderstands the relevant inquiry in determining whether a suit against a state agency is barred by the Eleventh Amendment. The question of whether a state agency is entitled to Eleventh Amendment immunity depends upon whether it is an arm of the state, not upon the type of relief sought. In making the determination of whether an entity is an arm of the state, the Third Circuit has outlined three factors for the court to consider. *See Peters v. Del. River Port Auth.*, 16 F.3d 1346, 1350 (3d Cir. 1994), *cert. denied* 115 S. Ct. 62 (1995). First, the court must assess whether if the plaintiff succeeds on his claims the judgment would be paid from the state treasury. Second, the court must examine the status of the entity pursuant to state law. Third, the court should consider the extent of autonomy enjoyed by the entity. The first factor is the most important one. *Id.*; *see also Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989) (*en banc*).

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8. The court notes that *Liverlight* was decided before the majority of the Supreme Court's decisions outlining the scope of the Eleventh Amendment.

The court finds that the Senate is entitled to Eleventh Amendment immunity. It is difficult to imagine what entity would be considered an arm of the Commonwealth if the Senate were not. Application of the Peters factors seems cumbersome in the present context. The Senate is one of the governing branches of the Commonwealth. Thus, under Peters, the question the court is required to answer is, in essence, whether the Senate is independent from itself. Any judgment obtained by Larsen would be satisfied by the state treasury and the court concludes that the Senate is an arm of the Commonwealth for Eleventh Amendment immunity purposes.

The court reaches the same conclusion with regard to the Supreme Court, and at least one other court has already so held. *Mattas v. Supreme Court of Pennsylvania*, 576 F. Supp. 1178, 1182 (W.D. Pa. 1983). In addition, the court finds that the CJD is entitled to Eleventh Amendment immunity. The CJD is created pursuant to the Pennsylvania Constitution. Pa. Const. art. 5, § 18(b). Appointments to the CJD are made by the Supreme Court and the Governor. Id. art. 5, § 18(b)(1). The CJD's funding is part of the Supreme Court budget, which flows directly from the budget for the judicial branch as approved by the Pennsylvania legislature. Any judgment obtained against the CJD would be paid out of state funds. Accordingly, the court will dismiss Larsen's claims against the Supreme Court and the CJD because it finds they are immune from suit pursuant to the Eleventh Amendment.[9]

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9. Although the Administrative Office of the Pennsylvania Courts argues that it is entitled to Eleventh Amendment Immunity, the AO's arguments were conclusory and provide little basis for the court to conclude at this juncture that this is so. Accordingly, the court will deny the AO's motion to dismiss based on Eleventh Amendment grounds.

The individual members of the Senate, Supreme Court, the CJD, the JCB and Defendants Frankforter and Sobolevitch also argue that they are entitled to Eleventh Amendment immunity.[10] Larsen has sued these Defendants in both their official and personal capacities. The Eleventh Amendment does not insulate Defendants from Larsen's claims against them in their personal capacities. *Kentucky v. Graham*, 473 U.S. 159, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985); *Scheuer v. Rhodes*, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). This is also true for Larsen's claims for punitive damages against Defendants as well. *Smith v. Wade*, 461 U.S. 30, 75 L. Ed. 2d 632, 103 S. Ct. 1625 (1983).[11]

When a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." *Pennhurst*, 465 U.S. at 102-03 (citing *Edelman*, 415 U.S. at 666-67). Larsen asks the court to "void" the Senate Defendants' impeachment verdict of guilty, the Supreme Court Defendants' appointments to the JCB, the CJD Defendants' interim order suspending him without pay, and enjoin Defendants Sobolevitch and Frankfurter's from

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10. Larsen has dismissed his claims against the JCG and its individual members in their personal capacities.

11. The complaint alleges that Larsen is suing both the Supreme Court, as a body, and the CJD, as a body, in their "personal" capacities. (Compl. at 30. PP (4), (6).) Neither of these enetities exist in anything other than their "official" capacity and Larsen's attempt to sue the bodies in their "personal" capacities is misplaced and his claims against them in this regard will be dismissed.

failing to reinstate his lifetime medical insurance benefits.[12] (Compl. at 29 PP (1) (3), (5).) In determining whether Larsen's claims are barred by the Eleventh Amendment, the court must determine whether his claims against the individual members in their official capacities are retrospective or prospective in nature. The court finds that they are.

Larsen's request that the court void the Senate members' impeachment verdict of guilty is, in essence, a request for prospective reinstatement or a direction to the members that they rescind their guilty verdict. Thus, the relief Larsen seeks against the individual Senate Defendants in their official capacities is not prohibited by the Eleventh Amendment. *See Warnock v. Pecos County, Tex.*, 88 F.3d 341, 343 (5th Cir. 1996) (claims for prospective reinstatement not barred by Eleventh Amendment); *Cross v. State of Ala.*, 49 F.3d 1490, 1503 (11th Cir. 1995) (district court properly enjoined state officials from failing to reinstate state employees); *Russell v. Dunston*, 896 F.2d 664, 668 (2d Cir. 1990) (existence of past harm does not render prospective injunction retrospective relief barred by Eleventh Amendment); *see also Berman Enterprises, Inc. v. Jorling*, 3 F.3d 602, 606-07 (2d Cir. 1993) (claim for declaratory relief seeking to vacate state officials' administrative orders not barred by Eleventh Amendment); *Nix v. Norman*, 879 F.2d 429, 433 (8th Cir. 1989) (Eleventh Amendment did not bar request for injunctive relief that state officials remove false allegations from employment record); *Darlak v. Bobear*, 814 F.2d 1055, 1061 (5th Cir. 1987) (request for injunctive relief requiring state officials to rescind suspension not prohibited pursuant to Eleventh Amendment).

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12. Larsen also asks the court to void the JCB and CJD Defendants' "action of interfering with [his] right to practice law." (Compl. at 29 P (3).)

The court also finds that the Eleventh Amendment does not bar Larsen's claims for declaratory and injunctive relief against the individual members of the Supreme Court, the JCB, the CJD and Defendants Frankfurter and Sobolevitch in their official capacities. These claims include Larsen's requests that the court: (1) vacate the Supreme Court Defendants' appointments to the JCB and CJD; (2) vacate the CJD Defendants' order suspending him without pay; (3) enter a declaratory judgment as to the JCB and CJD Defendants' authority to act with regard to his right to practice law; and (4) enjoin Defendants Sobolevitch and Frankfurter from failing to reinstate his lifetime medical insurance benefits. Accordingly, the court will deny the individual Senate Defendants', the Supreme Court Defendants', the CJD Defendants' and JCB Defendants', and Defendants Frankforter's and Sobolevitch's motions to dismiss Larsen's claims for declaratory and injunctive relief against them in their official capacities.

E. Legislative Immunity

The Senate Defendants assert that they are absolutely immune from suit in their personal capacities based on the doctrine of absolute legislative immunity. Legislators are entitled to absolute immunity for actions taken in their legislative capacity. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 406, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979); *Tenney v. Brandhove*, 341 U.S. 367, 95 L. Ed. 1019, 71 S. Ct. 783 (1951) Larsen argues that the Senate Defendants are not entitled to absolute legislative immunity because the Senate impeachment proceeding did not constitute a legislative act.

The purpose of affording legislators absolute immunity is so that they "are immune from deterrents to the uninhibited

discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney*, 341 U.S. at 377. Thus, the Supreme Court has held that legislators are immune from suits against them in their personal capacities if they "were acting within the legitimate sphere of their legislative activity." *Id.* at 376. While it is true that a conviction of impeachment may not involve "policy-making," *Acierno v. Cloutier*, 40 F.3d 597, 610 (3d Cir. 1994), conducting impeachment trials is one of the responsibilities charged to the United States and Pennsylvania legislatures and is within the legitimate sphere of legislative activity. Indeed, no other governmental body possesses such responsibility.

Larsen cites *Government of V.I. v. Lee*, 775 F.2d 514, 520-21 (3d Cir. 1985), in support of his argument that legislative immunity shields legislators from suit only for acts done in the process of enacting legislation. The issue in Lee was whether legislative fact-finding is the type of activity protected by legislative immunity. The Third Circuit held that it is, stating "fact-finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity." *Id.* at 521. It appears from the court's review of the case law that virtually all of the cases which address the question of whether legislators are entitled to legislative immunity are cases in which legislators were engaged in activities that are accurately characterized as prerequisites to, or ancillary to, the ultimate legislative acts of proposing, debating, and passing legislation. *See Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504-05, 44 L. Ed. 2d 324, 95 S. Ct. 1813 (1975) (members of Congress shielded by legislative immunity in issuing subpoena in context of authorized congressional investigation); *Tenney*, 341 U.S. at 377-78 (state legislative committee investigation into "un-american" activities within legitimate sphere of legislative

activity). The activities engaged in by the Senate Defendants in the present case were also prerequisites to, or ancillary to, the legitimate legislative act of impeachment. In conducting the impeachment proceedings, the Senate Defendants "were acting in a field where legislators traditionally have power to act." *Tenney*, 341 U.S. at 379. Pursuant to the United States Constitution, the United States Senate is granted sole authority to conduct impeachment trials. *Nixon v. United States*, 506 U.S. 224, 229, 122 L. Ed. 2d 1, 113 S. Ct. 732 (1993). The Pennsylvania Constitution grants similar authority to the Pennsylvania Senate. Pa. Const. art. 6, § 5 ("All impeachments shall be tried by the Senate."). The fact that legislators are not often called upon to conduct impeachment proceedings does not make their actions any less legislative in nature than those actions undertaken in passing legislation. All of the conduct by the Senate Defendants of which Larsen complains was undertaken in pursuit of the impeachment proceedings against him. In order to remove the Senate members "actions from the shield of legislative immunity, Larsen would need to allege that their actions in some way "usurped" the impeachment authority vested in them by the Pennsylvania Constitution. *Tenney*, 341 U.S. at 378. Larsen makes no such allegation. Accordingly, the court finds that dismissal of Larsen's claims against the Senate Defendants in their personal capacities is proper because they are entitled to absolute legislative immunity.

F. Abstention

(1) The CJD and JCB Individual Defendants

The CJD and JCB Defendants argue that given the current proceedings pending before it, the court should abstain from hearing Larsen's claims against them pursuant to *Younger*

v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971).

The proceedings currently before the CJD were instituted on April 18, 1994 when the JCB filed an application with the CJD for an interim order directing that Larsen be suspended from his duties without pay. The basis underlying the JCB's application was Larsen's conviction on April 9, 1994 in the Allegheny Court of Common Pleas finding Larsen guilty on two counts of criminal conspiracy under the Controlled Substances Act. On May 5, 1994, Larsen filed an answer with new matter to the JCB's application. On May 16, 1994, the JCB filed a response to new matter. On May 25, 1994, the CJD conducted a hearing on the JCB's application. The jury's verdict against Larsen was admitted into evidence. Larsen's counsel moved that the hearing be bifurcated in order to allow the introduction of testimony at a later date. The CJD denied the motion. On June 3, 1994, the CJD granted the JCB's application and entered an order directing Larsen's suspension without pay. *In re Larsen*, 655 A.2d 239 (C.J.D. 1994). On June 6, 1994, the JCB filed with the CJD a "Board Complaint - Formal Charges" against Larsen. Larsen maintains that the JCB Defendants have wrongfully asserted that they have the right to seek the revocation of Larsen's right to practice law and that their decision to lodge charges against him was in retaliation for his prior protected statements regarding Justices Zappala, Cappy and Chief Justice Nix. Larsen claims that the CJD Defendants acted without authority in entering the interim order suspending Larsen without pay. Specifically, he claims that because the Pennsylvania Constitution permits the interim suspension of judicial officers only in instances where a justice has been indicted or charged with a felony, the CJD's order suspending Larsen based on his two criminal convictions was improper. Larsen also alleges that the CJD Defendants have "wrongfully asserted" that they have authority over his right to

practice law in the Commonwealth of Pennsylvania. Furthermore, Larsen maintains that the CJD Defendants were motivated to issue the interim order based on Larsen's prior statements in his petitions for disqualification and recusal. Larsen seeks an order from this court voiding the CJD's June 3, 1994 order, "voiding the action of interfering with [his] right to practice law," (Compl. at 29, P 3), and awarding damages against the individual members of the CJD in their personal capacities.

"*Younger v. Harris* . . . and its progeny espouse a strong federal policy against federal-court interference with pending [state] judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982). The policies underlying abstention include "'a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.'" *Id.* (quoting *Younger*, 401 U.S. at 44)). "The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County*, 457 U.S. at 432. The Supreme Court has applied Younger in the context of attorney disciplinary proceedings, *Middlesex County*, 457 U.S. at 432, and the Third Circuit has applied Younger in the context of judicial removal proceedings, *Coruzzi v. State of New Jersey*, 705 F.2d 688, 690 (1983).

The Supreme Court has outlined three relevant areas of inquiry in determining whether abstention under Younger is appropriate. First, is there an ongoing state judicial proceeding?

Second, does the proceeding implicate important state interests? Third, does the plaintiff have an adequate opportunity to raise his constitutional challenges in the context of that proceeding? *Middlesex County*, 457 U.S. at 432.

(a) The Existence of an Ongoing State Judicial Proceeding

Further CJD proceedings relating to the formal charges against Larsen have been stayed at his request.[13] (See Defs.' Ex. S, Joint Motion for Continuance, In re Larsen, CJD No. 4 JD 94.) In addition, the CJD proceedings are also pending with respect to the CJD's interim order because it permits Larsen to move for modification or vacation of the order based on changed circumstances. *In re Larsen*, 655 A.2d at 243, 249. Larsen opines that there is presently no proceeding against him because the CJD's interim order is not appealable. Pa. Const. art. 5, § 18 (d) (2) Larsen's argument is without merit as the CJD's order specifically permits him to seek modification of the order under the appropriate circumstances. Moreover, Larsen himself has consented to stay the formal proceedings against him, of which the interim order is a component. The means by which to challenge the lodging of charges against him and the granting of the interim order are readily available to Larsen through the resumption of the proceedings before the CJD relating to the JCB's formal complaint against him.

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13. In evaluating the merits of Defendants' motions, the court has relied on documents outside of the complaint which are referred to in the complaint or which are public records. Both categories of documents are the types of documents which the court may properly consider without converting the instant motions to dismiss to motions for summary judgment. *Pension Benefit Guarantee Corp. v. White Consolidated Indus. Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

The court also finds that the proceedings in front of the CJD, including both the proceedings leading up to the issuance of the interim order and the proceedings relating to the JCB's formal complaint, are judicial in nature "since [they] bear several of the indicia of a judicial action." *Coruzzi*, 705 F.2d at 690. The JCB instituted interim proceedings against Larsen by filing an application, akin to a motion for a preliminary injunction. Larsen filed an answer and new matter and the JCB filed a response. The CJD subsequently conducted a hearing on the JCB's application. At the hearing, Larsen was represented by counsel and was offered the opportunity to take the stand as a witness on his own behalf, although he declined to do so. *In re Larsen*, 655 A.2d at 242. Furthermore, the JCB initiated formal proceedings against Larsen with the filing of a complaint pursuant to Article 5, Section 18 (a) (7). Proceedings before the CJD proceed in accordance with the law of evidence and parties appearing before the court have the right to discovery, to subpoena witnesses and to compel the production of documents, books, accounts, and other relevant records. Pa. Const. art. V, § 18 (b) (5). Parties appearing before the CJD are presumed innocent and all decisions of the CJD are to be in writing and contain findings of fact and conclusions of law. *Id.*

Additionally, the removal proceedings against Larsen are judicial in nature because they require the CJD to "investigate, declare, and enforce liabilities as they stood on present or past facts and under laws supposed already to exist." *Coruzzi*, 705 F.2d at 690-91 (internal quotations and alterations omitted).

(b) The Existence of Important State Interests

It is clear that "[Pennsylvania's] interests in assuring the ethical conduct of its judges and maintaining the integrity of its

judiciary are no less significant," *Coruzzi*, 705 F.2d at 691, than the interest the State of New Jersey possessed in "maintaining and assuring the integrity of the attorneys it licenses," *Middlesex County*, 457 U.S. at 434. Granting the relief requested by Larsen would "substantially interfere with the state's removal proceeding accompanied by a suspension without pay, by preempting the adjudication of a claim that could have been raised in that proceeding." *Coruzzi*, 705 F.2d at 691.

(c) Larsen's Opportunity to Raise his Constitutional Claims Before the CJD

The court does not find that Larsen is precluded from raising his constitutional claims before the CJD. The court notes that the only two federal constitutional claims which Larsen raises regarding the CJD Defendants' authority to act are (1) his rather amorphous claim that the Supreme Court improperly appointed members to the CJD and, therefore, that the CJD's decision to issue its interim order was in violation of Larsen's due process and equal protection rights, and (2) his claim that the CJD impermissibly relied upon his prior statements in his petitions for the disqualification and recusal of Justices Zappala and Cappy when the CJD decided to issue the interim order. Larsen's remaining claims relate to whether the JCB and CJD Defendants' actions were proper under the Pennsylvania Constitution and whether they have the authority to pursue the revocation of his right to practice law. Larsen's ability to litigate his state constitutional claims before the CJD are not of concern to the court in evaluating whether abstention is proper.[14] *Middlesex County*, 457 U.S. at 434 (deciding

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14. Several of the state claims Larsen raises in the complaint relating to

(continued...)

whether abstention appropriate based on whether plaintiff has adequate opportunity to raise federal challenges).

The CJD's opinion underlying the interim order does not indicate that Larsen attempted to raise to the CJD either of the federal constitutional challenges he seeks to raise in this court. From the CJD's exhaustive consideration of Larsen's state law claims, nothing in the court's opinion suggests it would fail to hear Larsen's federal constitutional claims. To the contrary, the CJD's opinion evidences that it gave a great deal of consideration to all of Larsen's state law claims.

The court finds that Larsen has not established that he will be unable to raise his federal constitutional claims before the CJD. First, Larsen's claims that the Supreme Court has improperly appointed members to the JCB and the CJD is more appropriately asserted against the Supreme Court and not the CJD and its individual members or the JCB's individual members. *See infra* § (F) (2). Second, if Larsen intends to make allegations of bias by the CJD and JCB Defendants he has offered no reason why he cannot assert such claims before the CJD just as litigants in this court must raise their claims of

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14. (...continued)
the CJD's authority to act were considered and decided by the CJD in its decision underlying the issuance of the interim order. *In re Larsen*, 655 A.2d at 242-46. Thus, the *Rooker-Feldman* doctrine would likely deprive the court of jurisdiction to entertain Larsen's claims contained in paragraphs ninety-two and ninety-three of the complaint were it inclined to address the merits of his claims. Additionally, Larsen's argument that the CJD cannot properly consider whether it has jurisdiction to act is completely without merit. A court is under the obligation at all times to determine whether it has jurisdiction over a particular case and to take particular action, regardless of whether either of the parties before it have raised such a challenge.

judicial bias by filing a motion for recusal. Larsen's claims of bias by the JCB would also be properly raised before the CJD as claims of prosecutorial bias.

In addition, Larsen has not demonstrated that the ongoing CJD proceedings will not afford him the opportunity to raise his First Amendment retaliation claims. Again, if Larsen is asserting these claims as a means of alleging bias on behalf of the CJD, the JCB or their members, he has articulated no reason why his situation is any different than any other litigant who is required to raise such claims in the tribunal before which he is appearing. Larsen claims that the CJD is not authorized to determine federal constitutional questions. However, nothing in the Pennsylvania Constitution prohibits the CJD from hearing such claims. The fact that the CJD is comprised of non-judges and non-lawyers provides an insufficient basis upon which to conclude that the proceedings before the CJD will not afford him an opportunity to litigate his constitutional claims. See *Middlesex County*, 457 U.S. at 435 (noting not all members of ethics committee conducting attorney disciplinary proceedings were lawyers).

Because the court finds that abstention is appropriate under Younger v. Harris, it will dismiss Plaintiff's claims against the individual JCB Defendants and the individual CJD Defendants in their official capacities.

(2) The Individual Supreme Court Defendants, Administrative Office of the Courts, and Defendants Sobolevitch and Frankforter

The court also finds that abstention is proper with regard to Larsen's claims asserted in parts II(a) & (b) of the amended complaint against the individual members of the Supreme

Court. In part II(a), Larsen alleges that the Supreme Court Defendants' appointments to the CJD "were done in an improper manner to deny [him] due process of law and equal protection of the law in the within proceedings." (Compl. ¶ 97.) Furthermore, Larsen claims that "some members of the . . . CJD were appointed to serve because they had close ties to members of the Supreme Court, with the result that Justice Larsen was denied due process of law and equal protection of the law." (*Id.* ¶ 98.) In part II(b), Larsen alleges that his statements regarding Justices Cappy, Zappala and Chief Justice Nix were substantial or motivating factors in the Supreme Court Defendants' decisions to appoint certain members to the CJD and JCB.

Although Larsen does not allege in part II(a) the specific injury he suffered as a result of the Supreme Court Defendants appointment of CJD and JCB members in an "improper manner" the court can discern only two possible injuries of which he could complain, that of bias or some impropriety in the CJD Defendants' issuance of the interim order suspending him without pay and/or impropriety in the JCB Defendants' decision to proceed against him. The court's interpretation of the amended complaint is bolstered by Larsen s contention in part II(b) that as a result of the Supreme Court Defendants taking into account his prior protected speech, he "was injured in that he was suspended without pay and improper action was taken against him with respect to his right to practice law." (*Id.* ¶ 103.) Thus, the injury which Larsen claims he suffered as a result of the Supreme Court Defendants' appointments is the lodging of charges against him and the improper issuance of the interim order.

Abstention with regard to these claims is mandated by the fact that a determination of Larsen's allegations would necessarily involve an evaluation of whether the JCB

Defendants acted with bias in seeking the interim order and filing a formal complaint against Larsen and whether the CJD acted with bias or improper intent in issuing the interim order. To evaluate these claims would require the court to interfere with the ongoing removal proceedings. The court has already found that the existence of these ongoing state proceedings requires the court to abstain from entertaining Larsen's claims against the CJD and JCB Defendants and that Larsen has failed to demonstrate why the proceedings before the CJD do not afford him the opportunity to raise his claims of bias. Thus, abstention with regard to Larsen's allegations against the individual members of the supreme court in parts II(a) and (b) is also proper.[15]

G. Failure to State a Claim

The Senate Defendants argue that dismissal of Larsen's claims against them in their official capacities is proper based on his failure to allege facts which, if proven, would entitle him to relief. Larsen asserts two separate claims against the Senate Defendants. Larsen claims that he had both property and liberty interests in his position as a supreme court justice and in not being barred from holding office. Accordingly, he alleges that the Senate Defendants' impeachment of him violated his right to due process pursuant to the Fourteenth Amendment to the

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15. The court recognizes that Larsen seeks to have this court void the supreme court's appointments to the CJD and JCB, a remedy which neither the CJD nor the JCB can provide. The only basis upon which to conclude that such a remedy would be appropriate would be a decision by the court that Larsen had been injured as a result of the improper manner in which the supreme court made appointments to the CJD and JCB. Making such a determination would require the court to intercede in the ongoing state proceedings and review the proceedings for bias on behalf of the CJD and/or the JCB.

United States Constitution. Larsen also avers that the Senate impeachment proceedings were subject to the procedural protections of the Sixth Amendment, which he claims were not adhered to in the impeachment process. The court will address Larsen's allegations seriatim.

(1) Deprivation of Property Interest

The Senate Defendants argue that Larsen did not possess a property interest in his position as a supreme court justice and that they were not required to comport with constitutional due process protections in impeaching him.

Whether or not Larsen had a property in interest in his position is a question properly answered by looking to Pennsylvania law. *Independent Entertrises Inc. v. Pittsburgh Water and Sewer Auth.*, 103 F.3d 1165, 1997 WL 6335, at *11 (3d Cir. Jan 9, 1997) (citing *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)). Thus, "according to the teachings of *Roth* . . . [Larsen] may not pursue [his] procedural due process claims . . . unless an independent source such as state law affords [him] a legitimate claim of entitlement" to his post as a supreme court justice. *Independent Enterprises*, 1997 WL, at *11 (internal quotations omitted). Larsen cites to no state law as the source of his alleged property right.

Defendants, on the other hand, point to several decisions by the Pennsylvania Supreme Court which make clear that in Pennsylvania, an elected official possesses at best a "highly circumscribed" interest in his office. *Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698, 713 (Pa. 1977); *see also In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 530 Pa. 335, 609 A.2d 132, 140-41 (Pa. 1992). Indeed, in *In re*

Legislative Reapportionment Comm'n, the Pennsylvania Supreme Court explicitly stated that "elected officials' interest in their offices does not merit constitutional protection." 609 A.2d at 141. In discussing whether a state legislator possesses a property interest in his office entitling him to procedural due process protections prior to his expulsion from the legislature, the court in *Sweeney* stated:

> An elected office is a public trust, not the private domain of the officeholder . . . . He holds office for the benefit of his constituents and cannot justifiably rely on a private need or expectation in holding office. He is periodically accountable to his constituents through the electoral process. Due to the paramount public interest in the integrity of the legislative process, the Pennsylvania Constitution provides for expulsion by two-thirds vote of the representatives of the people of the entire state. A member of the Legislature is thus subject to the political process at all times. This is properly so for the public interest in the office far outweighs any private interest of the officeholder. An elected official can never have tenure in the same sense as an ordinary public employee.

375 A.2d at 713 (emphasis added). Larsen argues that Sweeney and *In re 1991 Reapportionment Comm'n* are distinguishable from the instant case because they did not address supreme court justices' entitlement to office. He opines that because supreme court justices are elected for ten year terms and may be appointed by the governor to complete an unexpired term of a

justice who resigns, retires or dies, justices are not "subject to the political process at all times."

Larsen overlooks the fact that supreme court justices are subject to impeachment by a two-thirds vote of the Senate just as a member of the legislature is subject to expulsion by a two-thirds vote of either house of the Pennsylvania legislature. Thus, Larsen, like the legislator in *Sweeney*, is in fact "subject to the political process at all times." Additionally, although as elected officials supreme court justices do not represent their constituents by instituting public policy in the same manner as legislators, i.e. enacting legislation, they hold office "for the benefit of their constituents" because their constituents have elected them to dispense justice in accordance with the principles they have expressed publicly in seeking judicial office. Thus, as in the case of state legislators, the "public interest" in the office of a supreme court justice "far outweighs any private interest of the [justice]" himself. *Sweeney*, 375 A.2d at 713.

In support of his position that he had a property interest in his position, Larsen cites *Guarino v. Larsen*, 821 F. Supp. 1040 (ED. Pa.), *rev'd on other grounds*, 11 F.3d 1151 (3d Cir. 1993). Guarino involved a claim by Judge Guarino, a retired Court of Common Pleas judge on active service, that the Pennsylvania Supreme Court's revocation of his senior judge status without prior notice of any charges against him violated his due process rights. The district court held that Judge Guarino had a property right in being a senior judge until the expiration of his term of appointment and pursuant to the Pennsylvania Constitution, as a justice of the Pennsylvania Supreme Court. Judge Guarino had been removed from the bench pursuant to an order issued by then Justice Larsen. In concluding that Judge Guarino had a property right as a

supreme court justice, the district court relied upon Article 5, Section 18 of the Pennsylvania Constitution which provides for the removal of judicial officers through the procedure involving the JCB and the CJD. The court concluded that because Justice Larsen had removed Judge Guarino from his duties without following the procedures outlined in Section 18, the supreme court had denied Judge Guarino of due process.

The district court in *Guarino* concluded that Guarino possessed a property right "based on the due process guarantee provided to all Pennsylvania justices and judges under the Constitution of Pennsylvania." 821 F. Supp. at 1057. This court presumes that the court in *Guarino* was relying upon Article 5, Section 18 in reaching its conclusion. This court, however, is not inclined to reach a similar conclusion in the instant case. The district court's opinion in *Guarino* does not address the Pennsylvania Supreme Court's decisions in *Sweeney* and *In re 1991 Reapportionment Comm'n* in which the supreme court clearly stated that an elected official's property interest in his or her position is at best "highly circumscribed." Moreover, the mere existence of procedural protections, like the procedures outlined in Article 5, Section 18, are insufficient to create a property interest in one's post. "The existence of a property interest in employment turns on the substantive protection afforded the employee under state law, not the procedural protection." *Blanding v. Pennsylvania State Police*, 12 F.3d 1303, 1306 n.2 (3d Cir. 1993). A public employee has a property interest in his job if state law provides that the employee may only be terminated for cause. *Id.* at 1306. Thus, to the extent that the district court in Guarino relied exclusively upon the procedures outlined in Article 5, Section 18 in concluding that Guarino possessed a property interest in his position, this court respectfully declines to adopt its reasoning.

The court recognizes that in reaching its conclusion, the *Guarino* court have relied on the "for cause" bases for the removal of judicial officers delineated in Article 5, Section 18 of the Pennsylvania Constitution. Again, however, based on the Pennsylvania Supreme Court's decisions in *Sweeney* and *In re 1991 Reapportionment Comm'n*, this court does not find that the "for cause" grounds listed in Section 18 afforded Larsen an unqualified property interest in his office.

In *Sweeney*, the Pennsylvania Supreme Court held that legislators possessed a highly circumscribed interest in their offices despite the fact that the Pennsylvania Constitution contains the following language:

> Each House shall have power to determine the rules of its proceedings and punish its members or other persons for contempt or disorderly behavior in its presence, to enforce obedience to its process, to protect its members against violence or offers of bribes or private solicitation, and, with the concurrence of two-thirds, to expel a member, but not a second time for the same cause . . . .

Pa. Const. art. 2, § 11.

This paragraph, which the court reads as a "for cause" provision, is no different than provisions governing the removal of judicial officers contained in Article 5, Section 18(d)(1).[16]

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16. Section 18(d)(1) reads:

> A justice, judge or justice of the peace may be

(continued...)

Thus, in Pennsylvania, despite the fact that the Pennsylvania Constitution delineates limited bases which would justify a public official's removal from office, the nature of elected office as a public trust and the fact that public officials are subject to the political process at all times means that an elected official may "never have tenure in the same sense as an ordinary public employee." *Sweeney*, 375 A.2d at 713. It is the *Guarino* court's failure to distinguish the Pennsylvania Supreme Court's decisions in *Sweeney* and *In re 1991 Reapportionment Comm'n* that permits this court to reach a different conclusion regarding whether justices of the supreme court possess an unqualified property interest in their elected office. Given the "highly circumscribed" nature of Larsen's interest in his position as a supreme court justice, the court finds that for the most part, whatever procedural safeguards to which he was entitled pursuant to the Fourteenth Amendment were met by the impeachment proceedings.

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16. (...continued)

> suspended, removed from office or otherwise disciplined for conviction of a felony; violation of section 17 of this article; misconduct in office; neglect or failure to perform the duties of office or conduct which brings the judicial office into disrepute, whether or not the conduct occurred while acting in a judicial capacity or is prohibited by law; or conduct in violation of a canon or rule prescribed by the Supreme Court.

Pa. Const. art. 5, § 18(d)(1). Section 17 prohibits judicial officers from practicing law, holding office in a political party or organization, or holding a position in the federal or state government. Pa. Const. art. 5, § 17(i). Section 17 also states "justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the Supreme Court." *Id.* § 17(2).

The court notes that several of the claims made by Larsen appear to stem from his belief that the Senate was required to conduct the impeachment trial as this court would conduct a criminal trial.[17] The Supreme Court was confronted with a similar claim in *Nixon v. United States*, 506 U.S. 224, 122 L. Ed. 2d 1, 113 S. Ct. 732 (1993). In *Nixon*, former Chief Judge Nixon of the United States District Court for the Southern District of Mississippi argued that the United States Senate's procedure of appointing a committee to receive and hear evidence in impeachment proceedings violated the Constitution's requirement that the Senate "try" all impeachments because it prohibited most Senators from participating in the evidentiary hearings. 506 U.S. at 228. The Court rejected Nixon's assertion that the word "try" imposes a requirement on the Senate that the proceedings be in the form of a judicial proceeding. *Id.* The Constitution specifies that when trying impeachments, Senators are to be under oath, that no person shall be convicted by less than a two-thirds vote, and that when the President is tried, the Chief Justice shall preside over the proceedings. The Court declined to infer additional constitutional limitations on the form of impeachment proceedings.

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17. Larsen asserts, inter alia, that his due process rights were violated by the Senate delegating responsibility for the proceedings to the Senate impeachment committee. Larsen complains that, as a result, most members of the Senate did not hear the evidence presented against him. (Compl. P 58(a).) He opines that "given the nature of the charge, the remoteness in time of the events alleged, motivation of witnesses, and the sharply conflicting testimony, due process required members of the Senate to hear and observe the witnesses testify in person." (Compl. P 58(c).) See n.19 infra for further allegations which fail pursuant to the Court's reasoning in *Nixon*.

This court recognizes that the *Nixon* Court was concerned primarily with whether the federal impeachment clause lacked "judicially discoverable and manageable standards," thus demonstrating an intent by the framers to commit the authority to conduct impeachment proceedings to the Senate alone. *Id. at 230-31.* The fact that the issue decided by the Court in *Nixon* was whether Nixon's challenge to the Senate impeachment proceedings constituted a nonjusticiable controversy, does not lessen the import of the Court's discussion in evaluating what precisely the United States Constitution, and by extension the Pennsylvania Constitution, requires in the way of impeachment proceedings. Thus, the court concludes that although the *Nixon* Court ultimately concluded that it would not reach the merits of Nixon's challenge to his impeachment proceedings, it did so in part based on reasoning which is relevant in evaluating the merits of the allegations Larsen raises in the instant case.

The language in the Pennsylvania Constitution outlining the procedure to be followed by the Senate in conducting impeachment proceedings is quite similar to that contained in the United State Constitution. Article 6, Section 5 of the Pennsylvania Constitution reads, "all impeachments shall be tried by the Senate. When sitting for that purpose the Senators shall be upon oath or affirmation. No person shall be convicted without the concurrence of two-thirds of the members present." Larsen has proffered no reason why the court should interpret the word "tried" to require an impeachment proceeding in the nature of a judicial trial and depart from the reasoning articulated by the Supreme Court in Nixon regarding identical language in the United States Constitution. Article 6, Section 5 contains precisely the same two requirements for impeachment proceedings as the federal constitution -- that the Senators shall be under oath when conducting impeachment trials and that no

person shall be convicted on anything less than a vote of two-thirds of the members present.

The court's acceptance of the *Nixon* court's conclusion that the language "tried" does not require a judicial-type trial renders meritless several of Larsen's claims. First and foremost, *Nixon* demonstrates that Larsen did not have a right to have all of the Senate members present during the impeachment hearings. The Senate's delegation of the responsibility for conducting the proceedings to the committee was constitutionally permissible. Thus, Larsen's allegations contained in paragraphs 58(a), (c), (d), (e), (i) of the amended complaint fail and will be dismissed.[18]

Dismissal of the allegations contained in paragraphs 58(a), (c), (d), (e), (i), in addition to other claims, is also proper due to Larsen's failure to establish that due process protections entitled him to these procedures. The question of what process Larsen was due in the context of his impeachment trial is not easily answered. Given Larsen's status as an elected official his interest in his position was not akin to the interest possessed by a public employee who possessed an unqualified constitutionally protected property interest in his job. Thus, although the court concludes that Larsen was entitled to some pretermination process, it does not find that he was entitled to the type of process afforded an employee who has an unqualified constitutionally protected property interest in his job.

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18. In paragraph 58(d), Larsen asserts that the committee and the Senate improperly proceeded without establishing a standard of proof. Paragraph 58(e) and (i), respectively, assert that the committee and the Senate failed to adopt rules of evidence for the proceedings and that Larsen was precluded from effectively cross-examining witnesses.

Nevertheless, in determining whether Larsen has alleged impermissible deficiencies in the pretermination procedures he received, it is instructive to look to cases addressing due process claims brought by public employees who possess property interests in their job. As the following discussion will illustrate, even under the standards governing the procedural protections afforded employees with property interests greater than Larsen's, Larsen has failed to allege facts which, if proven, state a claim for a violation of due process. The court will review the procedural protections to which public employees possessing property interests in their jobs are entitled.

The Supreme Court has described the "root requirement of the Due Process Clause as being that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985) (internal quotations omitted). "This principle requires some kind of hearing prior to the discharge of an employee who has a constitutionally protected property interest in his employment." *Id.* (internal quotations omitted) (emphasis added). A hearing is necessary in order to permit the employee an opportunity to "present his side of the case," *id.* at 543, and serves as "an initial check against mistaken decisions -- essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action," *id.* at 545-56. The hearing may be informal -- "a full evidentiary [and adversarial] hearing is not required." *Curry v. Pa. Turnpike Comm'n,* 843 F. Supp. 988, 992 (E.D. Pa. 1994); *see also Loudermill,* 470 U.S. at 545. Also, a full hearing before the final decision-maker is not required. *McDaniels v. Flick, 59 F.3d 446, 454 (3d Cir. 1995), cert. denied, 116 S. Ct. 1017 (1996).* The employee may

present "his side of the story" either orally or in writing. *Loudermill*, 470 U.S. at 546.

Furthermore, the notice to which an employee is entitled must provide "a sufficient explanation of the employer's evidence to permit a meaningful response." *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74, 79 (3d Cir. 1989). "The employee need not be informed of all the evidence, but must be given a meaningful opportunity to respond in the sense that he must know the substance of the case the employer has against him." *Barkusie v. Indian River Sch. Dist.*, 951 F. Supp. 519, 1996 WL 756363, *12 (D. Del. 1996). An employer is not required to present an employee with notice of the proffered reasons for termination prior to the hearing -- "notice of the charges may be served at the time of the pretermination hearing." *Curry*, 868 F. Supp. at 992 (citing *Edmundson v. Borough of Kennett Square, 4 F.3d 186 (3d Cir. 1993)).* The court will address each of Larsen's allegations in light of the standards outlined above.

Larsen claims that his due process rights were violated in that most members of the Senate did not participate in the impeachment hearings and, thus, did not hear the evidence presented against him prior to voting. (Compl. P 58(a).) Due process does not require that Larsen receive a hearing before the final decision-maker.[19] *McDaniels*, 59 F.3d at 454. In addition, Larsen maintains that due process required the Senate Defendants to establish a standard of proof and/or rules of

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19. For the same reason, Larsen's claim that he was "denied the appearance of justice in that he was not informed at any time how the members of the Senate, other than members of the Committee, became acquainted with the evidence" also fails to allege a violation of due process. (Compl. ¶ 59.)

evidence. (Compl. P 58 (d), (e).) Larsen' s claims fail since the due process clause does not require a formal evidentiary hearing prior to the dismissal of a public employee possessing a property interest in his job. *Loudermill,* 470 U.S. at 545; *Curry,* 843 F. Supp. at 992. For the same reason, Larsen was not entitled to cross-examine the witnesses testifying against him.

In addition, Larsen claims procedural deficiencies in not being provided the opportunity to rebut or clarify the Senate committee's final report and call witnesses to testify in opposition to the findings contained therein. (Compl. P 58(f).) He alleges that the final report was "misleading and did not accurately or fully represent the facts produced at trial," *id.* ¶ 58(g), and that the final report failed to make explicit findings of credibility, *id.* ¶ 58(b). Larsen's claims fail, however, because due process required only that he be afforded the chance to rebut the charges against him. Furthermore, as he is not entitled to a full-blown evidentiary hearing, due process does not require the committee to make explicit factual findings underlying its conclusions. Larsen does not maintain that the Senate Defendants failed to notify him of the charges against him or offer him the opportunity to rebut these charges. He concedes that throughout the hearings he was represented by counsel and that he was provided with the opportunity to present argument to the full Senate on his behalf. (Compl. ¶ 51.) Due process required nothing more.[20]

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20. Larsen further alleges that his due process rights were violated in that the Senate found him guilty on article II yet acquitted him on article III. Article III accused Larsen of testifying falsely before the grand jury regarding the facts underlying the allegations contained in article II. Larsen does not proffer precisely what due process guarantees are violated by the Senate's alleged "inconsistent" findings and the court will dismiss this claim.

Larsen also alleges that his due process rights were violated because the Senate decided his pretrial motions after the impeachment proceedings, and because the Senate Defendants denied his motion to continue the proceedings, thus depriving him of the opportunity to review all the evidence against him. (Compl. ¶¶ 58(1), (m).) Due process, however, does not necessarily require advance notice to the employee of the employer's underlying reasons for terminating an employee possessing a constitutionally protected property interest in his job.[21] *Edmundson*, 4 F.3d at 193. Furthermore, as already noted, the constitution does not require that the employee be informed of all of the evidence against him, just that he must know the substance of the charges against him.[22] *McDaniels*, 59 F.3d at 454. Because Larsen does not claim that the Senate Defendants failed to inform him as to the nature of the charges against him -- indeed, the articles of impeachment were a matter of public record -- his allegations do not state a claim for a violation of due process.

Larsen also asserts several claims in which he appears to attack the impartiality of the Senators, and by extension, the impeachment proceeding itself. Two of these allegation are easily disposed of. First, Larsen maintains that Senator Fumo appeared as a witness at the hearings and also participated in the proceedings as a member of the Senate, ultimately voting to

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21. The court notes that even drawing all inferences from the complaint in favor of Larsen, he had access to the charges against him from at least May 18, 1994, the date on which the House of Representatives initially introduced the seven articles of impeachment. (Compl. ¶ 38.)

22. Larsen merely asserts that being unable to review the materials in and of itself violated his due process rights, without claiming any actual injury resulting, such as being unable to adequately rebut the charges against him.

convict. (Compl. ¶ 58(j).) Second, Larsen alleges that "another Senator who harbored ambitions of being a Pennsylvania Supreme Court Justice, served as a member of the Committee and voted to convict." (*Id.* ¶ 58(k).) The court does not read the case law delineating the due process protections afforded public employees as prohibiting either of these factual scenarios in the context of pretermination procedures. Furthermore, the votes of these two Senators were hardly dispositive in the final Senate vote of forty-four to five to convict Larsen on article II or the unanimous Senate vote to bar him from holding public office in the future. (*Id.* ¶ 52.)

Larsen also alleges that "during the evidentiary hearings and closing arguments, [he] was precluded from establishing that adverse witnesses had ex-parte (sic) communications with members of the Senate and members of the Committee." (*Id.* ¶ 58(h).) Larsen does not claim that these alleged "ex parte" communications prohibited him from knowing the substance of the Senate's case against him, or that such communications resulted in a lack of impartiality by the Senate Defendants. Larsen's contention appears to be that the occurrence of such communications in and of itself violated his right to due process. The court finds that without more, the mere existence of communications between Senate members and witnesses outside of Larsen's presence, even if true, would not amount to a violation of due process.

Larsen alleges two procedural improprieties which if proven, may constitute a violation of due process under either the due process protections afforded a public employee possessing a property interest in his job or under the lesser protections governing the removal of public officers. Where an employee with a constitutionally protected property interest in his job receives only a pretermination proceeding, as opposed

to a pretermination proceeding and posttermination process, due process requires that the pretermination decision-makers be impartial. *McDaniels*, 59 F.3d at 458-60. Larsen claims that he "was precluded from establishing the effect that Legislative Initiative Grants had on the proceedings, Senators and adverse witnesses. Such grants, known as 'walking around money,' or 'WAMS,' are highly sought after discretionary funds awarded directly by individual Senators to whomever they want and are used to maintain voting discipline among the other Senators." (Compl. ¶ 58(n).) Larsen also asserts that he "was precluded from establishing that adverse witnesses, their agents, or relatives had made financial contributions to certain members of the Senate, including Senators who sat on the Committee." (*Id.* ¶ 58(o).) Larsen might be able to prove facts which would show that due to the receipt of funds either in the form of WAMS or financial contributions, Senators were predisposed to vote to convict him on the articles of impeachment. Larsen's allegations regarding the WAMS and financial contributions to each Senator constitute allegations regarding the impartiality of the decision-makers in the impeachment process. If Larsen could prove facts supporting his claim, this might constitute a deprivation of due process and, therefore, dismissal of these allegation is inappropriate.[23]

In sum, the court finds that the majority of deficiencies in the impeachment process which Larsen claims constitute violations of due process are not based on rights to which he is entitled under the due process clause of the Fourteenth

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23. The court recognizes that should this case reach the discovery stage, discovery on these issues may require greater oversight by the court than exercised in most cases. Furthermore, Larsen will face a greater burden in demonstrating the viability of his claims regarding the WAMS and financial contributions at the summary judgment stage.

Amendment. Although in the preceding discussion the court has relied on case law which delineates the due process protections afforded employees who possess property rights in their jobs, Larsen's interest in his position as a supreme court justice entitles him to less protections than the due process protections provided to public employees who may only be terminated for cause. Larsen did not have "tenure in the same sense as an ordinary public employee." *Sweeney*, 375 A.2d at 713. Nevertheless, even under the standards governing pretermination proceedings for employees possessing unqualified property rights in their job, the majority of Larsen's claims fail as a matter of law.[24]

Larsen also alleges that the Senate Defendants deprived him of his property right "in not being barred from holding office." (Compl. ¶ 55.) Larsen's allegation amounts to a claim that he possessed a property right to seek public office. In response to the Senate Defendants' motion to dismiss, Larsen points to no source of state law which would create such a legitimate claim of entitlement and the court finds that his claim

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24. Although the court recognizes that federal law governs the determination of what process is due prior to the deprivation of a constitutionally protected property interest, it is worth noting that in Sweeney, the Pennsylvania Supreme Court held that "given the circumscribed nature of a legislator's private interest in his elected office and the overriding need for the Legislature to protect its integrity through the exercise of the expulsion power, it may be that the requirement of a two-thirds vote to expel by itself satisfies procedural due process." 375 A.2d at 713 (emphasis added). In this case, Larsen was not only impeached by a two-thirds vote of the Senate, but was also afforded numerous procedural protections.

is meritless. Accordingly, the court will grant the Senate Defendants' motion to dismiss with respect to this claim.[25]

It should be noted that the amended complaint does not specify whether Larsen is asserting a procedural or substantive due process claim. Both the Senate Defendants and Larsen address the arguments in their briefs only to the question of whether Larsen has stated a procedural due process claim. In order to maintain a substantive due process claim, Larsen would need to have alleged that the Senate Defendants "deliberately and arbitrarily abused its power," *Independent Enterprises*, 1997 WL 6335, at *12 (internal quotations omitted) in impeaching him, a claim that appears no where in the amended complaint. Furthermore, the court's finding that his interest in his position as a supreme court justice is highly circumscribed would negate Larsen's ability to maintain any such cause of action. The Third Circuit has stated that "a substantive due process claim grounded in the arbitrary exercise of governmental authority may be maintained only where the plaintiff has been deprived of a 'particular quality of property interest.' "*Id.* (quoting *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 600 (3d Cir. 1993). Beyond stating that the particular quality of property right to which substantive due process protections attach includes "fundamental property interests" the Third Circuit has not delineated precisely the types of interests which are protected. *Independent Enterprises*, 1997 WL 6335, at *12-13. Nevertheless, the court finds that Larsen's highly circumscribed interest in his position as an elected supreme court justice does not qualify as the type of

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25. Larsen does not argue in his opposition brief that he possessed a property interest in having the right to seek public office and it appears that he has abandoned this claim to the extent the complaint can be read to assert such a claim.

fundamental property interest warranting substantive due process protection.

(2) Deprivation of Liberty Interest

In addition to claiming that he possessed a property interest in his position as a supreme court justice, Larsen alleges that he possessed a liberty interest in his post as well.[26] He maintains that Defendants deprived him of his liberty interest without due process of law in violation of the Fourteenth Amendment.

"The Supreme Court has held that a person has a liberty interest in employment actions which require due process 'where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him.'" *Homar v. Gilbert*, 89 F.3d 1009, 1022 (3d Cir. 1996), *cert. denied*, 117 S. Ct. 678 (1997) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 573, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)). The court is unaware of any other liberty interest claim that Larsen could pursue in the context of challenging the process afforded him in the impeachment proceedings. Thus, although Larsen's amended complaint is somewhat unartfully drafted, the court construes it as an attempt to allege the type of claim recognized by the Supreme Court in *Roth*. Larsen's allegation, however, must fail, for he fails to allege an essential element of a stigmatization claim. Larsen does not claim that the Senate Defendants' allegations against him were false and/or misleading. *Fraternal Order of Police Lodge No. 5*, 868

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26. Larsen also maintains that he possessed a liberty interest in not being barred from office. The court's finding that Larsen received all the process he was due in conjunction with Defendants' impeachment of him defeats this claim as well.

F.2d at 82. The court will, therefore, dismiss Larsen's claim that the Senate Defendants deprived him of a liberty interest in conjunction with its impeachment proceedings against him.

(3) Sixth Amendment

Larsen claims that the Senate impeachment proceedings violated his rights to an impartial fact-finder, confront 'witnesses, and assistance of counsel and other "process due" pursuant to the Sixth Amendment. The Senate Defendants have moved to dismiss Larsen's Sixth Amendment claims on the basis that the Sixth Amendment does not apply to impeachment proceedings.

The court agrees. The Sixth Amendment by its terms applies only to "criminal prosecutions." U.S. Const. amend. 6. The proceedings against Larsen cannot under any circumstances be classified as criminal proceedings, therefore, his Sixth Amendment claims must fail.[27]

(4) First Amendment Retaliation

Larsen claims that the Senate Defendants violated his First Amendment rights in that their decision to proceed against him and to vote in favor of impeachment were motivated by his prior statements in his petitions for the disqualification and recusal of Justices Cappy and Zappala. The Senate Defendants

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27. As already discussed, in *Nixon* the Supreme Court in dicta refused to find that the United States Constitution's mandate that the Senate "try" all impeachment proceedings required the Senate to conduct the proceedings in the nature of a judicial proceeding. 506 U.S. 224 at 229-31. The court stated that the Framers did not intend to impose upon the Senate additional limitations in the manner of conducting impeachment trials other than those listed in Article I, section 3, clause 6. *Id.* at 230.

argue that dismissal of this claim is proper because the Pennsylvania Constitution affords them no discretion in deciding whether to pursue impeachment proceeding.

The court agrees with the Senate Defendants that the Pennsylvania Constitution does not afford them the discretion to decline to conduct impeachment proceedings once the House of Representatives has voted. Article 6, Section 4 states that "the House of Representatives shall have the sole power of impeachment." Pa. Const. art. 6, § 4. Thus, a plain reading of the constitution demonstrates that it is the House of Representatives alone which decides whether or not to impeach and institute proceedings against a public official. Once the House has acted to impeach, Article 6, Section 5 designates the Senate as the body which will conduct the impeachment trial. Pa. Const. art. 6, § 5. The constitution affords the Senate no authority to disregard a resolution of impeachment and decline to conduct an impeachment trial. Thus, the court will dismiss Larsen's claim that the Senate violated his First Amendment rights in deciding to conduct the impeachment trial against him.

The Senate Defendants also move to dismiss Larsen's claim that his prior statements were substantial factors motivating their decision to vote against him. Defendants opine that because the article of impeachment on which Larsen was found guilty does not relate to his prior protected statements,[28] he has failed to state a claim for retaliation under the First Amendment.

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28. The Senate Defendants do not challenge Larsen's claim that his statement in the petitions for disqualification and recusal are protected under the First Amendment and, thus, the court makes no finding in this regard in the instant memorandum.

In order to state claim for retaliation in violation of the First Amendment, a plaintiff must first demonstrate that he engaged in protected activity. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). Next, a plaintiff must show that the activity or statements in question was a substantial or motivating factor in the government's alleged retaliatory action. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). A defendant may defeat the plaintiff's claim by showing by a preponderance of the evidence that absent the protected activity, the plaintiff would have suffered the same adverse action. *Id.*; *Watters v. City of Philadelphia*, 55 F.3d 886, 892 (3d Cir. 1995). Defendants' argument that in order to state a claim for First Amendment retaliation Larsen must show that the adverse action taken against him relates to his prior protected statements has no support in the case law outlining the elements Larsen must prove in order to succeed on his claims. Accordingly, Defendants' argument provides no basis upon which to dismiss Larsen's First Amendment claims.

(5) Medical Insurance Benefits

In part III(a) of the amended complaint, Larsen asserts that the Supreme Court Defendants, the Administrative Office of the Courts, and Defendants Frankforter and Sobolevitch revoked his right to receive lifetime medical benefits in violation of his right to contract and his rights to due process and equal protection.

Larsen's claim regarding the discontinuation of his medical insurance benefits stems from Defendant Frankforter's June 17, 1994, notice to him, on behalf of all the Supreme Court Defendants, that as of June 3, 1994, he would no longer receive medical benefits pursuant to the Pennsylvania

judiciary's "Fully State-Paid Basic and Specialized Coverage" insurance plan. Defendant Frankforter informed Larsen that Defendants were cancelling his medical benefits based on a 1993 amendment to Article 5, Section 16 of the Pennsylvania Constitution. The relevant portion of Article 5, Section 16 reads:

> Except as provided by law, no salary, retirement benefit or other compensation, present or deferred, shall be paid to any justice, judge or justice of the peace who, under section 18 or under Article VI, is suspended, removed or barred from holding judicial office for conviction of a felony or misconduct in office or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute.

Pa. Const. art. 5, § 16(b). Larsen claims that at the time the Supreme Court Defendants revoked his medical benefits, his right to receive such benefits had already vested.

Larsen alleges that in January 1974, when he initially became a member of the Pennsylvania judiciary, one of the terms and conditions of his service was a medical plan that provided lifetime medical benefits for members of the judiciary with twenty or more years of service, regardless of age. On or about December 12, 1989, the Pennsylvania Supreme Court adopted a new medical insurance plan which provided lifetime medical benefits for members of the judiciary with ten or more years of service, regardless of age. As of December 12, 1989, Larsen had served as a member of the Pennsylvania judiciary for more than ten years. Larsen argues that as a result of his ten years of service, his right to receive lifetime medical benefits

upon separation from the judiciary vested on December 12, 1989. Defendants' revocation of his benefits, Larsen contends, violates the impairment of contracts clause of the United States Constitution and his rights to due process and equal protection.

In support of their motion to dismiss Larsen's impairment of contract claim, Defendants argue that in so far as the amended complaint alleges that on December 12, 1989 the Supreme Court "adopted a new medical insurance plan for retired members of the state judiciary," Larsen's claim fails because the amended complaint on its face demonstrates that the medical plan applied only to retired members of the judiciary. (Compl. P 108, emphasis added.) Since Larsen was removed from office pursuant to the sentence imposed as a result of his criminal conviction, removed pursuant to the CJD's interim order and impeached, under the terms of the plan he was not entitled to receive lifetime medical benefits.

Defendants' argument fails. First, a determination of whether or not the terms of the medical insurance plan exclude Larsen as a potential beneficiary is not a question properly resolved on a motion to dismiss. The plan itself is not before the court. Larsen has alleged that he was covered by the terms of the plan and at the motion to dismiss stage the court is required to accept as true all factual allegations in the amended complaint.

Second, the Supreme Court Defendants did not cite the terms of the plan as the basis upon which they were relying in revoking Larsen's lifetime medical benefits. Defendant Frankforter cited Article 5, Section 16 of the Pennsylvania Constitution. Thus, in evaluating whether Larsen has stated a claim for impairment of contract, the court is required to determine whether Defendants' proffered reasons provide a

legitimate basis upon which to cancel Larsen's medical insurance.

The court finds that Larsen has alleged sufficient facts in the amended complaint to support a claim for impairment of contract under the federal constitution. The court's decision is based on prior decisions of the Pennsylvania Supreme Court.

The question of whether or not the Supreme Court Defendants may properly rely upon the newly enacted provision of Article 5, Section 16 of the Pennsylvania Constitution depends upon whether or not prior to its enactment, Larsen possessed a vested right to receive lifetime medical benefits upon his separation from the judiciary. In Pennsylvania, the law is well-settled that where a public employee's right to receive benefits has vested, any attempt to later interfere with that right constitutes an unconstitutional impairment of contract. *Association of Pa. State College and Univ. Facilities v. State System of Higher Educ.*, 505 Pa. 369, 479 A.2d 962, 965 (Pa. 1984) (citing cases); *Miller v. State Employees' Retirement Bd.*, 498 Pa. 103, 445 A.2d 88, 89 (Pa. 1981). This principle is based on Pennsylvania's long-standing recognition that the right to receive retirement benefits is contractual because "retirement provisions for public employees is that of deferred compensation for service actually rendered in the past." *Commonwealth ex rel. Zimmerman v. Officers and Employees Retirement Bd.*, 503 Pa. 219, 469 A.2d 141, 142-43 (Pa. 1983). Vesting of public retirement benefits usually occurs when the employee, "having made all required contributions, has completed the number of years of service required for eligibility." *Police Pension Fund Ass'n Bd. v. Hess*, 127 Pa. Commw. 498, 562 A.2d 391, 395 (Pa. Commw. 1989).

The issue of law that appears unsettled in Pennsylvania is whether the right to receive medical insurance benefits is a form of deferred compensation which, upon vesting, gives rise to unalterable contractual rights. Although several lower courts in Pennsylvania have held that medical insurance benefits are a form of deferred compensation, the Pennsylvania Supreme Court has never directly addressed the issue. *See City of Chester v. Fraternal Order of Police*, 150 Pa. Commw. 235, 615 A.2d 893, 898-99 (Pa. Commw. 1992) (medical insurance benefits form of deferred compensation for past services rendered); *Newport Township v. Margalis*, 110 Pa. Commw. 611, 532 A.2d 1263, 1265-66 (Pa. Commw. 1987) (applying theory of deferred compensation to medical insurance benefits); *Township of Tinicum v. Fife*, 95 Pa. Commw. 516, 505 A.2d 1116, 1119-1120 (Pa. Commw. 1986) (medical benefits as form of deferred compensation reflecting contractual rights); *see also Turley v. John Hancock Mutual Life Ins. Co.*, 315 Pa. 245, 173 A. 163, 165 (Pa. 1934) (recognizing vesting of employee's right to receive medical benefits without discussing whether benefits form of deferred compensation).

The court's review of the relevant case law reveals only three opinions by the Pennsylvania Supreme Court in which it has indirectly addressed the question of whether medical insurance benefits are a form of deferred compensation which, upon vesting, may not be altered retroactively. In *Upper Merion Fraternal Order of Police Lodge v. Lower Merion Township*, the court addressed the question of whether an arbitrator's termination of post-retirement medical benefits to former township employees required the township to violate the First Class Township Act by requiring it to provide health coverage

after retirement. 512 A.2d 612, 615 (Pa. 1986).[29] Three members of the court interpreted the Act as prohibiting Lower Merion from contracting to provide insurance coverage to anyone who was not a township employee and vacated the arbitrator's award on that basis. *Id.* (Zappala, J. and Flaherty, J. with Nix, C.J. concurring). However, in an opinion authored by former Justice Larsen and joined by former Justices Hutchinson and Papadakos, Larsen expressed the belief that post-retirement medical benefits are a form of deferred compensation "for the compensation foregone during active employment in exchange for benefits and security upon retirement." *Id.* at 619.

The second case in which the Pennsylvania Supreme Court has commented on the issue of whether medical insurance benefits are a form of deferred compensation is *In re Upper Providence Police Delaware County Lodge No. 27 Fraternal Order of Police,* 514 Pa. 501, 526 A.2d 315 (Pa. 1987). The issue in *Upper Providence* was whether in directing the elimination of post-retirement hospital and medical benefits the arbitrator had exceeded his power. The Home Rule Act prohibits municipalities from diminishing former municipal employees' entitlement to benefits. 526 A.2d at 322. In dicta, the supreme court noted that "while the [appellant] did not initially challenge the arbitration award on constitutional grounds, elimination of these benefits . . . would also pose serious constitutional problems." *Id.* at 322 n.6. In support of

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29. Aside from citing to Lower Merion as a means of illustrating the supreme court's view on the issue of whether Pennsylvania law recognizes medical insurance benefits as a form of deferred compensation, the precedential value of the equally divided court's opinion is questionable given the court's later dismissal of the appeal on reargument as "having been improvidently granted." *Lower Merion, 518 Pa. 118, 541 A.2d 738 (1988).* The court did not, however, rescind its prior opinion.

this statement, the court cited to two of its prior opinions holding that amendments to the Commonwealth's retirement system impermissibly impaired employees' contract rights based on the fact that retirement benefits are a form of deferred compensation. *Id.* (citing *Association of Pa. State College and Univ. Facilities*, 479 A.2d 962; *Catania v. State Employees' Retirement Bd.*, 498 Pa. 684, 450 A.2d 1342 (Pa. 1982)). Former Justice Larsen authored the supreme court's opinion in *Upper Providence* and was joined by former Chief Justice Nix, former Justices McDermott, Hutchinson, Papadakos and present Chief Justice Flaherty and present Justice Zappala.

The third case in which the Pennsylvania Supreme Court indirectly addressed the issue of whether medical insurance benefits are a form of deferred compensation is *Shiomos v. State Employees' Retirement Bd.*, 533 Pa. 588, 626 A.2d 158 (Pa. 1993). The issue in *Shiomos* was whether the Public Employee Pension Forfeiture Act as applied to former Court of Common Pleas Judge Shiomos constituted an unconstitutional impairment of contract under Article 1, Section 17 of the Pennsylvania Constitution. Enacted on July 8, 1989, the Forfeiture Act prohibits the payment of pension benefits to public employees convicted of any one of the crimes enumerated in the Act. Shiomos's entitlement to receive retirement benefits vested on July 30, 1979, when he was credited with the necessary ten years of service on the bench. Shiomos argued that since his right to receive his pension had vested prior to the commission of the criminal acts underlying his conviction, revoking his retirement benefits constituted an impermissible impairment of his right to contract.

The supreme court agreed that had Shiomos retired at the end of his term in 1982 without assuming any additional public service duties "his pension contract would not be subject

to the forfeiture provisions of [the Act], even though the Act was enacted before his right to receive his pension had vested." 626 A.2d at 162. Shiomos had, however, assumed a second term of office after the enactment of the Act and, thus, took office for a second time subject to the terms of the Act and its applicability to public employees like himself. The court stated "whether or not a public employee's right to receive retirement benefits has vested, or he or she is in actual receipt of benefits, all previous accumulated rights to receive such benefits are subject to forfeiture by and through the renewed agreement which is formed each time a person chooses to become a public official as defined by [the Act]." *Id.* at 162-63. Justice Cappy authored the supreme court's opinion in Shiomos, joined by present Chief Justice Flaherty and present Justice Zappala, and former Chief Justice Nix.

An issue not before the supreme court in *Shiomos*, but one that Shiomos had argued before the commonwealth court, was the legality of the Administrative Office of the Court's termination of Shiomos's medical coverage. On appeal, Shiomos only presented argument regarding the commonwealth court's order affirming the revocation of his right to receive his pension. The supreme court noted, however, that [our] opinion shall only address the issues raised in [the case dealing with Shiomos's pension rights] as we agree with appellant's position that our decision in this case is dispositive of the issues in the companion appeals." *Id.* at 590 n.4. Additionally, in noting the date on which Shiomos's pension would be forfeited, the court stated "the medical benefits of appellant Shiomos . . . would also be forfeited." *Id.* 160 n.7.

In the absence of a clear statement by Pennsylvania's highest court holding that the right to receive medical insurance benefits is a form of deferred compensation, this court is

required to predict how it would rule. *Rabatin v. Columbus Lines, Inc.*, 790 F.2d 22, 24 (3d Cir. 1986). In reaching its conclusion, it is proper for the court to follow the decisions of intermediate state courts unless "other persuasive data" indicate that the Pennsylvania Supreme Court would rule differently. *Fisher v. USAA Casualty Ins. Co.*, 973 F.2d 1103, 1105 (3d Cir. 1992) (quoting *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237, 85 L. Ed. 139, 61 S. Ct. 179 (1940)). The decisions of lower Pennsylvania state courts are "indicia" of how the Pennsylvania Supreme Court would rule on the issue presently before this court. *McGowan v. Univ. of Scranton*, 759 F.2d 287, 291 (3d Cir. 1985) (quoting *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1167 (3d Cir. 1981)).

The court predicts that the Pennsylvania Supreme Court would hold that under the appropriate circumstances medical benefits may be a form of deferred compensation. Although not having had the occasion to squarely address the issue, the supreme court has implicitly suggested that medical benefits are a form of deferred compensation. In the instant case, assuming the veracity of the facts alleged in the complaint, Justice Larsen may ultimately be able to prove that his right to receive such benefits vested on December 12, 1989 and that Defendants' retroactive application of the 1993 amendment to Article 5, Section 16 impermissibly impaired his right to contract. Therefore, dismissal of Larsen's impairment of contract claims at this stage in the proceeding is inappropriate.

In addition, dismissal of Larsen's due process claim relating to the revocation of his medical insurance benefits is also improper. In support of dismissal, Defendants argue that Larsen did not have a contractual right to continue to receive state-paid medical insurance benefits. As the court has found that under Pennsylvania law, under the appropriate

circumstances, medical benefits are a form of deferred compensation and that Larsen may be able to prove that his right to receive such compensation vested on December 12, 1989, Defendants' argument provides no basis upon which to dismiss Larsen's due process claim.[30]

Defendants also move to dismiss Larsen's claim that Defendants have deprived him of equal protection of the laws in that other judges who qualified for lifetime benefits who were later removed from office under circumstances similar to his own continue to receive state-paid medical benefits. In support of dismissal, Defendants maintain that Larsen has failed to allege membership in a protected class which would afford him protection under the equal protection clause. The equal protection clause does not, however, prohibit only governmental actions that differentiate between "suspect" or "quasi-suspect" classes of individuals. Whether or not a plaintiff is a member of a suspect class determines the appropriate standard to be applied in evaluating the legitimacy of the state's actions. *See Envirotech Sanitary Systems, Inc. v. Shoener*, 745 F. Supp. 271, 280 n.11 (M.D. Pa. 1990) (Conaboy, J.). Lack of membership in a protected class does not, however, relieve the government of the obligation to act reasonably in differentiating between groups of similarly situated individuals. Thus, since Larsen's equal protection claim involves neither the deprivation of a fundamental right nor discrimination based on a suspect classification, the court will ultimately evaluate his claims under the rational

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30. Defendants also argue for dismissal of Larsen's due process claims based on the fact that he received all process he was due in his impeachment proceeding before the Senate, his criminal conviction, and his hearing before the CJD. Defendants' argument has no merit as none of these proceedings addressed the issue of the termination of Larsen's medical insurance benefits.

relationship test. *Palmer by Palmer v. Merluzzi*, 868 F.2d 90, 96 (3d Cir. 1990). Determination of whether Defendants acted reasonably in depriving Larsen of his right to receive lifetime medical benefits as compared with other similarly situated individuals is inappropriate at this stage in the litigation and Defendants' motion to dismiss this claim will be denied.[31]

(6) PHSA Claims

In parts III (b) and (c) of the amended complaint, Larsen asserts that the Supreme Court Defendants, Defendant Administrative Office of the Courts, and Defendants Sobolevitch and Frankfurter have denied him benefits under the Public Health Services Act ("PHSA"), 42 U.S.C. §§ 201 *et seq.*, 42 U.S.C. §§ 300bb-1 *et seq.* 42 U.S.C. § 300bb-(2) of the PHSA requires state and local government group health plans to provide continuation coverage for eighteen months to certain individuals upon termination of their employment. Such coverage must consist of coverage identical to the coverage

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31. The individual Supreme Court Defendants, the Administrative Office of the Pennsylvania Courts and Defendants Sobolevitch and Frankforter also argue that dismissal of Larsen's claims against them is proper based on the doctrine of qualified immunity. The court will not consider the arguments of the Supreme Court Defendants to the extent that they relate to claims which, pursuant to *Younger v. Harris*, the court will dismiss. Furthermore, the AO and Defendants Sobolevitch and Frankforter's arguments in support of qualified immunity are limited to the same arguments they assert in support of the outright dismissal of Larsen's claims. As the court has determined that these arguments provide no basis upon which to dismiss Larsen's impairment of contract, due process and equal protection claims, they also provide no basis upon which to afford Defendants immunity from suit in their personal capacities. Defendants will be free to renew their arguments at the summary judgment stage based on the relevant legal principles of law as discussed in this memorandum.

provided under the group health plan to current employees. Larsen claims that Defendants have wrongfully denied him coverage pursuant to section 300bb(2) and that their decision to do so was unconstitutionally motivated by his prior statements regarding Justices Cappy, Zappala, and Chief Justice Nix. Defendants argue that Larsen was removed from office based on "gross misconduct," an express exception to the PHSA's requirement that state and local governments permit employees to pay a premium and participate in group health insurance for eighteen months after termination. 42 U.S.C. § 300bb-3(2). Furthermore, Defendants argue that even if Larsen prevailed on his section 300bb-1 claim, his claims are moot because the Eleventh Amendment prohibits the court from granting Larsen anything other than preliminary injunctive relief. Defendants opine that this would be outside the court's powers since any entitlement Larsen may have had to continued health care coverage would have expired on November 3, 1995.

In response, Larsen argues that he was not convicted for conduct relating to his position as a supreme court justice and, therefore, his case is distinguishable from the cases cited by Defendants in support of dismissal.[32] *See Burke v. American Stores Employee Benefit Plan*, 818 F. Supp. 1131 (N.D. Ill. 1993) (employee's termination for improper use of promotional materials constitutes gross misconduct and COBRA's provisions not triggered); *Adkins v. United Int'l Investigative Services, Inc.*, No. C:91-0087 BAC, 1993 WL 345186 (N.D. Cal. March 27, 1993) (security guard's termination of

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32. The cases cited by Defendants were all decided pursuant to the Consolidated Omnibus Budget Reconciliation Act or "COBRA" which is virtually a mirror image of the PHSA only it applies to private employers. 29 U.S.C. §§ 1161-68. Thus, cases interpreting the term "gross misconduct" under COBRA are appropriately used in interpreting the same term as it is used in the PHSA.

employment for leaving post while on duty constituted gross misconduct under COBRA); *Karby v. Standard Products Co.*, NO. 3:90-2918-17, 1992 WL 333931 (D.S.C. June 22, 1992) (employee's false statements on conflict of interest disclosure form and theft of company property constitutes gross misconduct); *Avina v. Texas Pig Stands, Inc.*, No. SA-88-CA-13, 1991 WL 458848 (W.D. Tex. Feb. 1, 1991) (employee's termination for irregularities in handling cash, invoice irregularities and failure to improve performance of one of defendant's stores constitutes gross misconduct).

The court is not prepared at this juncture to make a definitive determination as to whether Larsen's convictions constitute gross misconduct within the meaning of sect ion 300bb -3(2), although it is likely that the court will ultimately conclude that this is so. The relevant question in determining whether Larsen committed gross misconduct is not merely whether he abused his position as a supreme court justice, but whether he committed acts of misconduct as an employee of the Commonwealth generally. Larsen was convicted on two counts of conspiracy to obtain possession of controlled substances. In order to effectuate his crimes, he directed his staff employees to secure prescription drugs in their names and had them pay for the prescriptions using their National Prescription Administrators ("NPA") cards. NPA "is a drug benefit program administered by the NPA on behalf of the state judiciary for its employees." *Commonwealth v. Larsen,* 682 A.2d at 786 n.2. Had Larsen carried out his unlawful acts without the assistance of state employees under his employ or the judiciary's benefit program, the court might be more likely, once it reached the

issue, to conclude that his criminal activity was unrelated to his employment.[33]

The court need not, however, decide this issue at the present time for two reasons. First, if Larsen succeeds on his claim that Defendants have improperly revoked his right to receive lifetime medical benefits his PHSA claim will become moot. Second, the Senate impeached Larsen for improper ex parte communication with an attorney who had cases pending before the supreme court. This offense clearly constitutes gross misconduct relating to his employment and his position as a supreme court justice. If Larsen is unsuccessful on his claims that the Senate Defendants committed constitutional errors in the impeachment process, the impeachment verdict will stand. This would provide an independent basis for finding that Larsen is ineligible for PHSA continuation coverage and would moot his claims.[34]

Defendants also argue that Larsen's PHSA claims should be dismissed because the eighteen month continuation period has expired and the Eleventh Amendment prohibits the court from granting him retroactive monetary relief. The court does not agree that the expiration of the eighteen month period deprives it of authority to grant relief in this case. If this were true and the court were prohibited from granting equitable relief beyond the statutorily proscribed eighteen month limit, courts

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33. At trial, at least two of Larsen's staff members testified that they carried out his requests in part because he was "the boss" and they felt they had no choice. *Commonwealth v. Larsen*, 682 A.2d at 786 n.4.

34. Because the court finds that Larsen's PHSA claims may be moot depending upon the outcome of other issues in the case, the court will not address the issue of whether he has stated a claim for First Amendment retaliation in the denial of continuation coverage under the PHSA.

would be extremely limited in the relief they could afford under the PHSA. In addition, section 300bb-7 explicitly authorizes potential plaintiffs to "bring . . . action[s] for appropriate equitable relief" 42 U.S.C. § 300bb-7.

H. Senate Defendants' Motion Pursuant to Rule 41(b)

The Senate Defendants have moved to recover the costs of Larsen's previously dismissed commonwealth court action pursuant to Federal Rule of Civil Procedure 41(b).

Rule 41(b) states:

> If a plaintiff who has once dismissed an action in any court commences an action based upon, or including the same claim against the same defendants, the court may make such order for the payment of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Fed. R. Civ. P. 41(d). The decision whether to stay an action and impose costs pursuant to Rule 41(d) is within the broad discretion of the trial court. 5 Moore's Federal Practice P 41.16 at 41-185 (2d ed. 1996) (citing cases). "The purpose of the rule is to prevent the maintenance of vexatious law suits and to secure, where such suits are shown to have been brought repetitively, payment of costs of prior instances of such vexatious conduct." *United Transp. Union v. Maine Central R.R. Co.*, 107 F.R.D. 391, 392 (D. Me. 1985).

The court will deny Defendants' motion. Although several of the claims Larsen asserts in the present action are

similar to ones he raised before the commonwealth court, the two cases are hardly identical. As the court has already noted in its discussion regarding the applicability of the *Rooker-Feldman* doctrine, many of the claims that Larsen raises in the instant case are ones that arose out of the impeachment proceedings and, therefore, could not have been raised at the time he filed suit in commonwealth court. Additionally, in the commonwealth court action, Larsen sought primarily preliminary injunctive relief. Here, he seeks permanent injunctive relief after a full hearing on the merits of his amended complaint. *See United Transp. Union,* 107 F.R.D. at 393. Also, given the fact that the political question doctrine may have prohibited Larsen from asserting many of his claims against the Senate Defendants in state court, the court does not find his decision to file suit in federal court unreasonable or motivated by any improper purpose." *Id.*

I. Senate Defendants' Motion to Strike Portions of the Amended Complaint

Pursuant to Federal Rule of Civil Procedure 12(f), the Senate Defendants argue that the court should dismiss paragraphs twenty-two, twenty-five, thirty-five, sixty, and sixty-one of the amended complaint. Rule 12(f) permits the court to strike "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The paragraphs Defendants move to strike address the allegations made by Larsen in his petitions for disqualification and recusal regarding Justices Zappala and Cappy and Chief Justice Nix.

It is within the court's discretion to strike portions of the complaint which technically fall within the ambit of Rule 12(f). *North Penn Transfer, Inc. v. Victaulic Co. of America,* 859 F. Supp. 154, 158 (E.D. Pa. 1994). "Motions to strike . . . are not

favored and usually will be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues." *Id.* (internal quotations omitted).

The allegations contained in the paragraphs which Defendants move to strike relate to Larsen's First Amendment claims against the Senate Defendants which the court has declined to dismiss. These portions of the amended complaint allege facts which address the nature and substance of Larsen's allegations regarding various justices of the Pennsylvania Supreme Court, thus supporting his claim that these statements are entitled to First Amendment protection. Furthermore, the facts alleged in these paragraphs are matters of public record. Accordingly, the court does not find that Defendants will be prejudiced by their inclusion in the amended complaint. The court will deny the motion to strike.

I. JCB Defendants' Motion for Sanctions

The JCB has moved for the imposition of sanctions pursuant to Rule 11 against Larsen and his counsel. The underlying premise upon which the JCB Defendants base their motion, is the frivolity of Larsen's claims against them. The court, however, will abstain from hearing these claims and makes no finding as to the meritoriousness of Larsen's allegations against the JCB. As presented to the court, the JCB Defendants' motion would require the court to address the merits of Larsen's claims. Such an undertaking would be inappropriate in light of the court's decision to abstain. Moreover, the court does not find that its decision to abstain indicates such frivolity on Larsen's or his counsel's behalf in filing suit in federal court to warrant the imposition of sanctions

in this case. The JCB Defendants are not prohibited from renewing their motion at a later stage in the proceeding.

IV. Conclusion

The court will enter an order in accordance with the foregoing discussion.

SYLVIA H. RAMBO, Chief Judge

Middle District of Pennsylvania

Dated: February 28, 1997.

ORDER

In accordance with the accompanying memorandum of law, IT IS HEREBY ORDERED THAT:

(1) The motion to dismiss of the Senate of Pennsylvania is GRANTED.

(2) The motion to dismiss of the Supreme Court of Pennsylvania is GRANTED.

(3) The motion to dismiss of the Court of Judicial Discipline is GRANTED.

(4) All claims asserted against the Senate, Supreme Court and Court of Judicial Discipline in their personal capacities are DISMISSED.

(5) All claims against the individual Senate Defendants in their personal capacities are DISMISSED.

(6) All claims against the individual members of the Court of Judicial Discipline in their official and personal capacities are DISMISSED.

(7) All claims against the individual members of the Judicial Conduct Board in their official capacities are DISMISSED.

(8) All claims asserted in parts II(a) and (b) of the complaint against the individual members of the Supreme Court in their official and personal capacities are DISMISSED.

(9) All claims asserted in paragraphs fifty-eight (58) (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (1), (m), (p), (q), and paragraph fifty-nine (59) against the Senate Defendants in their official capacities are DISMISSED. The claims asserted in paragraphs fifty-eight (58) (n) and (o) stand.

(10) Plaintiff's claims that he possessed a liberty interest in his job as a supreme court justice are DISMISSED.

(11) All claims asserted in paragraph fifty-five (55) are DISMISSED.

(12) All claims asserted in paragraph fifty-seven (57) are DISMISSED.

(13) The individual Senate Defendants motion to dismiss Plaintiff's claim that the Senate Defendants violated his First Amendment right in deciding to pursue impeachment proceedings against him contained in part I(b) of the complaint is GRANTED.

(14) The Senate Defendants' motion pursuant to Rule 41(b) is DENIED.

(15) The Senate Defendants' motion to strike portions of the complaint is DENIED.

(16) The Judicial Conduct Board Defendants' motion for sanctions is DENIED.

(17) Plaintiff's motion to strike portions of the Judicial Conduct Board Defendants' brief and exhibits supporting their motion for sanctions is DENIED as moot.

(18) Plaintiff's request for oral argument is DENIED.

(19) All other relief otherwise requested by Defendants and not specifically referenced in this order is DENIED.

(20) Defendants shall respond to Plaintiff's motion for partial summary judgment within sixty days from the date of this order.

SYLVIA H. RAMBO, Chief Judge

Middle District of Pennsylvania

Dated: February 28, 1997.

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

ROLF LARSEN, Plaintiff

v.

SENATE OF THE COMMONWEALTH OF
PENNSYLVANIA, et al., Defendants

NO. 95-CV-1540

AMENDED COMPLAINT

Identity of the Parties

1. Plaintiff Rolf Larsen is an individual who resides in Allegheny County, Pennsylvania.

2. The Senate of the Commonwealth of Pennsylvania ("Senate") is an unincorporated association consisting of fifty members with offices in Harrisburg, Pennsylvania.

3. At all times relevant here 4n, the Senate Consisted of Senators: Roy C. Afflerbach, Anthony B. Andrezeski, Gibson E. Armstrong, Earl Baker, Albert V. Belan, Clarence D. Bell, Leonard J. Bodack, Michael E. Bortner, David J. Brightbill, J. Doyle Corman, Michael M. Dawida, Michael B. Fisher, Vincent J. Fumo, Stewart J. Greenleaf, Melissa A. Hart, David W. Heckler, Edward W. Helfrick, Edwin G. Holl, Roxanne H. Jones, Robert C. Jubelirer, Gerald J. Lavalle, Charles D. Lemmond, Jr., H. Craig Lewis, J.

William Lincoln, F. Joseph Loeper, Roger A. Madigan, Bruce S. Marks, Robert J. Mellow, Harold F. Mowery, Jr., Raphael J. Musto, Michael A. O'Pake, Frank A. Pecora, John E. Peterson, Eugene E. Porterfield, Terry L. Punt, Jeanette F. Reibman, James J. Rhoades, Robert D. Robbins, Frank A. Salvatore, Allyson Y. Schwartz, Tim Shaffer, John J. Shumaker, Patrick J. Stapleton, William J. Stewart, J. Barry Stout, Richard A. Tilghman, Jack Wagner, Noah W. Wenger, and Hardy Williams.

4. The Supreme Court of Pennsylvania is the highest appellate court in the Commonwealth of Pennsylvania and has a location in (Middle District) Harrisburg, Pennsylvania.

5. The Supreme Court of Pennsylvania consisted of Justices Robert Nix, John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, Frank Montemuro, and Ronald Castille, at all times relevant herein.

6. The Court of Judicial Discipline ("CJD") is an eight member unincorporated State Administrative tribunal that sits and maintains offices in Harrisburg, Pennsylvania.

7. Joseph F. McCloskey, William F. Burns, Dawson R. Muth, Peter DePaul, Carol K. McGinley, Christine L. Donohue, Justin M. Johnson and William Cassenbaum were members of the Court of Judicial Discipline at all times relevant herein.

8. The Judicial Conduct Board ("JCB") is a twelve member unincorporated State Board which maintains its offices in Harrisburg, Pennsylvania,,whose function is to submit petitions, etc., to the CJD in order to activate the CJD.

9. Joseph A. Del Sole, Gerard P. Egan, Arthur J. Edmunds, Diane M. Edmundson, John W. Herron, Frederick Wells Hill, Esquire, Sister Matthew Anita MacDonald, Gerald J. O'Connor, Andrew Palm, Charles W. Rubendall, II, James E. Russo, Bernard C. Watson, were members of the JCB at all times relevant herein, and William J. Arbuckle, III, Bruce A. Antkowiak, and Thomas A. Bergstrom were employees of the JCB at all times relevant herein.

10. Defendant Administrative office of Pennsylvania Courts is an unincorporated body whose function is to assist in administering the Pennsylvania Court system, and which maintains offices in Mechanicsburg, Pennsylvania.

11. Nancy M. Sobolevitch was the Court Administrator of Pennsylvania at all times relevant herein with an address at Mechanicsburg, Pennsylvania.

12. David A. Frankforter was the Manager of Human Resources of the Court Administrator of Pennsylvania at all times relevant herein, with an address at Mechanicsburg, Pennsylvania.

13. All defendants are being sued in their official and personal capacities, and who acted under color of state law at all times relevant herein.

Jurisdiction

14. This court has jurisdiction under 28 U.S.C., Section 1331, providing jurisdiction over cases involving federal questions, and 28 U.S.C., Section 1343 and 42 U.S.C., Section 1983, providing jurisdiction over cases involving civil rights and violations of the Constitution of the United States.

Part I(a) - Larsen v. Senate and Senators

15. The Senate and all Senators above are made defendants herein.

16. Rolf Larsen served as a judge on the Court of Common Pleas of Allegheny County from 1974 to 1978, and as a Justice on the Supreme Court of Pennsylvania from 1978 to 1994. Justice Larsen was elected to the Supreme Court for a 10-year term, beginning in January 1978, and won a retention election for a 10year term beginning in January 1988.

17. In about 1988, the Judicial Inquiry and Review Board ("JIRB") charged Justice Larsen with several violations of Article V, Section 17(b), of the Pennsylvania Constitution, and the Code of Judicial Conduct, and began an investigation of the alleged violations.

18. On July 17, 1991, the JIRB issued "Report of the JIRB to the Supreme Court of Pennsylvania, Part II." The JIRB found Justice Larsen, acting without improper motive, had created an appearance of impropriety by meeting ex parte with a trial judge in a then-pending action in Allegheny County Court of Common Pleas. The JIRB recommended that Justice Larsen be publicly reprimanded.

19. On October 14, 1992, the Supreme Court of Pennsylvania, by Justices Zappala and Cappy, with Justice Papadakos dissenting, issued a per curium order, without opinion, adopting the JIRB report and recommendation.

20. On November 24, 1992, Justice Larsen served his petition for disqualification and recusal of Justices Zappala and Cappy. Justice Larsen served supplemental and second supplemental petitions on December 1.4, 1992, and January 7, 1993, respectively.

21. The petitions for disqualification and recusal raised serious questions about the impartiality and motivation of Justice Zappala and Justice Cappy during the JIRB investigation of Justice Larsen and in deciding to reprimand Justice Larsen. The petitions asked Justices Zappala and Cappy to recuse themselves, or, in the alternative, that they be disqualified from considering the JIRB report and recommendation.

22. The petitions made general allegations as to the motivations of Justice Zappala and Justice Cappy, and specific allegations of acts of impropriety by them, as well as impropriety by Chief Justice Nix in interfering in a pending trial in Lehigh County, Commonwealth v. David Lee Yohn, and in the Supreme Court's handling of Yohn's petition for allowance of appeal. Allegations included:

a. justice received kickbacks for directing bond work to an underwriting law firm;

b. a justice met ex parte with litigants;

c. justices rewarded an attorney for illegal assistance in offering free legal services;

d. a justice granted favorable treatment to a litigant seeking reconsideration for illegal and extra-judicial reasons;

e. Chief Justice Nix improperly interfered in the pending trial in Commonwealth v. David Lee Yohn, and that the Supreme Court improperly handled Yohn's petition for allowance of appeal over the course of three and one-half years, eventually denying Yohn's petition; and,

f. that despite the obvious improper behavior of Chief Justice Nix, no investigation was undertaken or charges made against Chief Justice Nix.

23. On December 6, 1992, Justice Cappy wrote to Chief Justice Nix:

> "As a result of my vote to discipline Mr. Justice Larsen at No. 155, JIRB Docket 1992, he has made assertions against me in his Petition for Disqualification and Recusal which not only challenges my personal integrity, but also the integrity of the Supreme Court of Pennsylvania.
>
> "* * * However, since the integrity of the Court and its operating procedures have been placed in question in the minds of the public . . .

> "As for me, I welcome enthusiastically the investure of such a panel, less so for the inevitable complete demudding of my name than for the just response it will give to Pennsylvania citizens, proper demand for accountability, fair play and truth-telling."

24. No later than December 20, 1992, as a result of the allegations of Justice Larsen in his petitions, former attorney general Ernie Preate, Jr., appointed two special counsels to investigate the allegations.

25. On December 31, 1992, the Philadelphia Inquirer published an article entitled "Sources say Justice Larsen could face more severe discipline - even removal." The article said:

> "Pennsylvania Supreme Court Justice Rolf Larsen could be removed from the bench as a result of his own for review of a disciplinary case against him, according to sources close to the court.
>
> "Removal would be the most dramatic of a range of possible consequences that could result from Larsen's request that the court reconsider its October decision to reprimand him. The court, by a 2-1 ruling on Oct. 14, found that Larsen had improperly communicated with a lower court judge about a pending case in 1986.
>
> "In asking for a reconsideration last month, Larsen, who denies any misconduct, made sweeping accusations against the two justices

who had voted to reprimand him, Stephen A. Zappala and Ralph J. Cappy.

"Those justices, according to knowledgeable sources, now are reviewing Larsen's request and re-examining the massive record of an investigation by the state Judicial inquiry and Review Board (JIRB) into Larsen's conduct, an inquiry that led to the reprimand vote.

"The sources, who would not agree to be named in print, said the review was being conducted on an accelerated, top priority basis and could be completed within two or three weeks.

"One source said that Larsen's removal was a possibility but that the court could decide to take a lesser action, such as simply upholding the reprimand. The source stressed that no decision has been made.

"Two other sources said they believed removal was likely. 'That's definitely the way they're going,' said one; they may 'bounce him like a basketball.'

"The second source said that Larsen, in requesting reconsideration of the reprimand, had 'fashioned the club that beats him to death.'

* * * *

"Long-simmering animosities among some of the seven Supreme Court justices have come to a head in the Larsen case."

26. As part of the investigation purportedly of Justice Larsen's allegations, the special counsels impaneled the Ninth Statewide Investigating Grand Jury, which heard testimony over a nine-month period in 1993, including testimony from Justice Larsen and Chief Justice Nix.

27. In January, 1993, Rep. Christopher K. McNally filed a Petition in the Pennsylvania House of Representatives ("House"), calling for Justice Larsen's impeachment, and accusing him of violations of the Code of Judicial Conduct.

28. The grand jury reported two areas of alleged misconduct by Justice Larsen: that he systematically maintained a list of petitions for allowance of appeal to be given special handling by his staff; and, that he regularly obtained prescription medications for his own use by causing a physician to issue prescriptions in the names of members of his staff.

29. On October 22, 1993, the grand jury issued Presentment No. 5 recommending that criminal charges be brought against Justice Larsen regarding the prescription drugs.

30. On October 25, 1993, G. Thomas Gates, supervising judge, issued an order accepting Presentment No. 5.

31. On October 28, 1993, Justice Larsen was charged with criminal conspiracy and multiple violations of the Controlled Substances Act. That same day, the Supreme Court relieved Justice Larsen from all judicial duties. However, Justice Larsen continued to receive his salary.

32. On November 5, 1993, grand jury report no. 1 was made public.

33. Grand jury report no. 1 became the basis for investigation of Justice Larsen by the Pa. House and the Judicial Conduct Board. The Pa. House Judiciary Committee requested, and apparently received from the Attorney General, copies of the testimony given (of approximately 220 witnesses) and exhibits presented, to the grand jury. This grand jury material was not then made available to Justice Larsen.

34. On November 23, 1993, the Pennsylvania House adopted House Resolution No. 205, session of 1993, authorizing its judiciary committee to investigate the conduct of Justice Larsen. After public hearings and investigation, the judiciary subcommittee on courts issued a report and recommendation.

35. On January 26, 1994, David Lee Yohn filed a writ of habeas corpus in federal court in Philadelphia.

36. On April 9, 1994, after a five day trial, Justice Larsen was convicted of two counts of criminal conspiracy under the Controlled Substances Act.

37. On April 22, 1994, the House subcommittee on courts voted to recommend to the entire House a resolution, to impeach Justice Larsen.

38. On May 18, 1994, House Resolution 324 was introduced, listing seven Articles of Impeachment against Justice Larsen.

39. On May 24, 1994, Resolution 324 was adopted by the House.

40. Article 5 alleged Justice Larsen's statements in his petitions were false and made in bad faith with a reckless disregard for the truth, and were made to obtain a reversal of his reprimand. The Senate later acquitted Justice Larsen of this Article.

41. On June 6, 1994, the Senate received the Articles of Impeachment from the House Managers, and passed a resolution, appointing an impeachment committee.

42. Pursuant to Article V of the Pennsylvania Constitution, no person shall be convicted without the concurrence of two thirds of the members of the Senate present.

43. The Senate had on July 23, 1993, adopted Article X of the Rules of Practice and Procedure in the Senate when sitting on Impeachment Trials. The Rules set forth the procedure by which the Senate would conduct the Impeachment Trial of Justice Larsen.

44. Article X established the Senate Impeachment Committee ("the Committee"), a committee of six Senators, each of whom would be appointed by the President Pro Tempore, to conduct evidentiary hearings by examining documents and listening to live testimony.

45. Senator Robert C. Jubelirer, President Pro Tempore of the Senate, appointed Senators Stewart J. Greenleaf, Charles D. Lemmond, Jr., H. Craig Lewis, Jeannette F. Reibman, Tim Shaffer and Hardy Williams, to the Committee.

46. On June 20, 1994, Justice Larsen filed an answer with new matter to the Articles of Impeachment.

47. On June 30, 1994, Justice Larsen filed an omnibus pretrial motion with the Senate, moving that the Senate dismiss this action for various reasons and, in addition, that the impeachment trial be held before the full Senate.

48. Justice Larsen's pretrial motion also contained a motion for a pretrial hearing before the full Senate, a motion for discovery, a motion for payment of attorney's fees and costs, a motion for recusal of certain Senators and a motion for continuance.

49. On August 8, 1994, while the full Senate was not in session, the Committee began evidentiary hearings on the impeachment of Justice Larsen and concluded the hearings on September 9, 1994.

50. On September 20, 1994, the full Senate heard arguments by counsel and without debate voted to deny all of plaintiff's pretrial motions.

51. On September 27, 1994, the full Senate convened and heard closing arguments by the House Managers and Justice Larsen's counsel. Simultaneously, the Committee provided for the first time each Senator with its Final Report of the Senate Impeachment Committee ("Final Report"), which provided a purported summary of evidence presented for the seven Articles of Impeachment. A copy was given to counsel for plaintiff at the same time for the first time.

52. On October 4, 1994, the Senate voted on the seven Articles of Impeachment. Justice Larsen was convicted by a vote of 44 to 5 on Article II of the Articles of Impeachment. Justice Larsen was acquitted on the other six

Articles. The Senate then voted unanimously to bar Justice Larsen from holding any office of trust or profit under the Commonwealth of Pennsylvania.

53. Article II alleged that in 1988 Justice Larsen had encouraged improper contact by Pittsburgh lawyer, Richard Gilardi, who asked Justice Larsen personally to review two petitions and then, at Justice Larsen's direction, gave him the cover sheets of the cases, writing "yes" on the petition he wanted granted and "no" on the petition he wanted denied.

54. Justice Larsen had property and liberty interests in his office as a Justice on the Supreme Court of Pennsylvania.

55. Justice Larsen had property and liberty interests in not being barred from holding office.

56. Justice Larsen's property and liberty interests were protected by the due process clause of the Fourteenth Amendment to the United States Constitution.

57. The proceedings by their nature were subject to guarantees of the Sixth Amendment to the United States Constitution, including an impartial fact-finder, confrontation with witnesses, and assistance of counsel.

58. The proceedings leading up to the conviction of Justice Larsen did not constitute a trial, and violated process due under the circumstances and in light of the interests involved, including process due under the Sixth Amendment, for each of the following reasons:

a. Most members of the Senate, who were not members of the Committee. did not hear any

evidence against Justice Larsen on Article II. Additionally, members of the Committee frequently absented themselves during the hearings.

b. Decision on Article II, required those who voted, to weigh contradictory testimony of Justice Larsen and Mr. Gilardi. Justice Larsen testified, without qualification, that he was innocent of the charge in Article II. A former secretary to Justice Larsen, Barbara Roberts, testified in a manner inconsistent with the testimony of both Justice Larsen and Mr. Gilardi. Ms. Roberts was impeached by evidence that she was a disgruntled fired employee, and was romantically involved with Mr. Gilardi. The Final Report did not address the credibility of witnesses or make a recommendation.

c. Given the nature of the charge, the remoteness in time of the events alleged, motivation of witnesses, and the sharply conflicting testimony, due process required members of the Senate to hear and observe the witnesses testify in person.

d. The Committee and the Senate refused Justice Larsen's request that a standard of proof be established, and, in fact, a standard of proof was never established.

e. The Committee and the Senate refused Justice Larsen's request that they adopt rules of

evidence for the hearings, and, in fact, rules of evidence were never adopted.

f. Because of the simultaneous issuance of the Final Report and the closing arguments, Justice Larsen was not afforded the opportunity to review, address, rebut or clarify the Final Report. Justice Larsen was not given opportunity to testify or call witnesses in opposition to the Final Report.

g. The Final Report was misleading and did not accurately or fully represent the facts produced at trial.

h. During the evidentiary hearings and closing arguments, Justice Larsen was precluded from establishing that adverse witnesses had ex-parte communications with members of the Senate and members of the Committee.

i. Justice Larsen was precluded from effectively cross-examining adverse witnesses.

j. Senator Vincent Fumo, who voted to convict and otherwise participate in the proceedings as a Senator, also appeared as a witness in the proceedings.

k. Another Senator who harbored ambitions of being a Pennsylvania Supreme Court Justice, served as a member of the Committee and voted to convict.

l. Justice Larsen's pretrial motions were decided post-trial.

m. Justice Larsen's request to continue the proceedings were denied because of a scheduled rush to judgment. Shortly before the hearings began, an avalanche of material had been delivered to Justice Larsen's counsel, but because of the time limitations, they were never able to be reviewed.

n. Justice Larsen was precluded from establishing the effect that Legislative Initiative Grants had on the proceedings, Senators and adverse witnesses. Such grants, known as "Walking Around Money," or "WAMS," are highly sought after discretionary funds awarded directly by individual Senators to whomever they want and are used by each party's leadership to maintain voting discipline among the other Senators.

o. Justice Larsen was precluded from establishing that adverse witnesses, their agents, or relatives had made financial contributions to certain members of the Senate, including Senators who sat on the Committee.

p. The Senate's finding of guilty as to Article II of the Articles of Impeachment is in direct conflict with the Senate's finding of acquittal as to Article III of the Articles of Impeachment. The Senate acquitted Justice Larsen (Article III) of testifying falsely when he testified, priority,

very specifically, in detail and without qualification, that the alleged events that Justice Larsen was alleged to have participated in, as set forth in Article II, did not occur.

q. The Senate's finding of guilty as to Article II of the Articles of Impeachment is in direct conflict with the Senate's finding of acquittal as to Article VII and violates Article 6, Section 7 of the Pennsylvania Constitution.

r. The Senate's finding of guilty as to Article II of the Articles of Impeachment was an influenced decision instead of a reasoned decision.

59. Justice Larsen was denied the appearance of justice in that he was not informed at any time how the members of the Senate, other than members of the Committee, became acquainted with the evidence (if they did). After his conviction, Justice Larsen, through counsel, asked members of the Senate voting for his conviction, other than members of the Committee, whether they read transcripts of witnesses relating to Article II or viewed their testimony on television. members of the Senate have failed to say how they became acquainted with the evidence.

60. By memorandum and order dated May 5, 1995, the U.S. District Court for the Eastern District of Pennsylvania (Judge Clarence C. Newcomer) granted David Lee Yohn's writ of habeas corpus, and said that Chief Justice Nix's interference in the Yohn trial was "particularly egregious" and "nothing other than a gross abuse of the jurisdictional limits of his power." Judge Newcomer noted that the "Supreme Court's handling of the petition was, at the very least, unprincipled,"

and that "several holds were placed on the-petition, in large part to avoid the embarrassment of airing the internal disputes of the Supreme Court publicly." Yohn v. Love, No. 94-524 (E.D. Pa. 5/5/95).

61. On February 9, 1996, the U.S. Court of Appeals for the Third Circuit affirmed the district court's order granting Yohn's writ of habeas corpus. Yohn v. Love, No. 95-1412 (3d Cir, 2/10/96).

Part I(b) Larsen v. Senate and Senators

62. Paragraphs 1 61 above are incorporated herein by reference as if fully set forth at length.

63. The statements of Justice Larsen in his petitions for disqualification and recusal were substantial or motivating factors in the decisions to proceed against him, and leading to the decisions to remove him from office and bar him from ever holding public office in Pennsylvania, and in the decisions themselves.

64. Justice Larsen's statements involve matters of public concern, in that they involve the conduct and integrity of the Supreme Court, and those charged with investigating the conduct of the Supreme court.

65. Justice Larsen was injured in that he was removed from office and barred from ever holding public office in Pennsylvania.

66. Justice Larsen's statements in the petitions were protected by the speech and petition clauses of the First Amendment to the U.S. Constitution, and the decisions to

remove him from office and bar him from ever holding public office in Pennsylvania, were in violation of the First Amendment.

Part II(a) - Larsen v.. Supreme Court of Pennsylvania, Court of Judicial Discipline, and Judicial Conduct Board, et. al.

67. The Supreme Court of Pennsylvania, Robert Nix, John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, and Frank Montemuro are made Defendants herein.

68. The CJD, Joseph F. McCloskey, William F. Burns, Dawson R. Muth, Peter DePaul, Carol K. McGinley, Christine L. Donahue, and Justin M. Johnson are made defendants herein.

69. The JCB, Joseph A. Del Sole, Gerard P. Egan, Arthur J. Edmunds, Ms. Diane M. Edmundson, John W. Herron, Frederick wells Hill, Matthew Anita MacDonald, Gerald J. O'Connor, Andrew Palm, Charles W. Rubendall, II, James E. Russo, Bernard C. Watson, William J. Arbuckle, III, Bruce A. Antkowiak, and Thomas A. Bergstrom are made defendants herein.

70. On May 18, 1993, the electorate in the Commonwealth of Pennsylvania adopted an amendment ("1993 Amendment") to Article V of the Pennsylvania Constitution, changing the judicial discipline system.

71. The 1993 Amendment established a two-tiered system of judicial discipline. Under the new system, the JCB investigates allegations of misconduct and may file formal

complaints with the CJD. The CJD then decides the merits of the case and, in appropriate cases, enters an order of discipline. Appeals from decisions of the CJD are to the Supreme Court of Pennsylvania, unless the respondent judicial officer is a Justice of the Supreme Court, in which case a Special Tribunal of seven judges of the Superior and Commonwealth Courts, who are not members of the JCB or the CJD, hear the appeal.

72. Part of the 1993 Amendment, Article V, Section(d)(2) says that "... the [CJD] may issue an interim order directing the suspension, with or without pay, of any justice, Judge, or justice of the peace against whom formal charges have been filed with the [CJD] by the [JCB] or against who has been filed an indictment or information charging a felony".

73. Article V, Section 18(a)(5), says that "the [JCB] shall prescribe general rules governing the conduct of members." Pursuant thereto in 1993, the JCB adopted the Interim Rules of Procedure Governing the Judicial Conduct Board ("Interim Rules"). These rules specifically omitted "felony indictment or information" as a basis for interim suspension.

74. Rule 10 of the Interim Rules limits (and attempts to extend) the JCB's power, authority and jurisdiction to seek an interim order of suspension to only two situations: one, if the "continued service of the judicial officer is causing or may cause immediate and substantial public harm;" two, if "the continued service of the judicial officer may erode public confidence in the orderly administration of justice."

75. On October 28, 1993, the Attorney General of Pennsylvania, then Ernie Preate, Jr., announced that he was charging Justice Larsen with certain violations of the law

involving his obtaining of his prescribed drugs for the treatment of chronic depression and anxiety. On the same day the Supreme Court of Pennsylvania entered an order relieving Justice Larsen of all of his judicial and administrative responsibilities and duties as a Supreme Court Justice.

76. On January 7, 1994, Pennsylvania, by its Attorney General, filed an information in the Court of Common Pleas of Allegheny County, charging Justice Larsen with 28 certain felonies, including the placing of prescription medications meant to be used by Justice Larsen in the names of others in order to protect his privacy.

77. In January 1994, the JCB wrote to Justice Larsen that it was instituting an investigation into all his activities.

78. On March 10, 1994, the JCB notified Justice Larsen to continue the investigation, pursuant to "J.C.B.I.R.P. 7(A)(4)."

79. On March 10, 1994, the JCB filed an application with the CJD for an interim order directing the suspension of Justice Larsen with pay, on the basis that Justice Larsen had been charged with a felony, and said that if Justice Larsen was found guilty of a felony charge then the JCB's requested suspension with pay be automatically converted to a suspension without pay.

80. On or about March 20, 1994, Justice Larsen filed an answer and new matter to the JCB's application. on March 25, 1994, the CJD issued an order denying the application.

81. On April 18, 1994, the JCB again filed an application with the CJD for an interim order directing the

suspension of Justice Larsen without pay (the "Application") based this time on the fact of a jury in the Allegheny County Court of Common Pleas finding Justice Larsen guilty of two of the aforementioned charges (conspiracy). Sentencing had not occurred. The convictions are presently on appeal.

82. The JCB lacked the power and jurisdiction to file the Application with the CJD because neither one of the abovementioned criteria was applicable. Justice Larsen had already been relieved from his judicial duties by the October 1993, order of the Supreme Court. It was impossible for him to harm the public or erode the confidence in the orderly administration of justice, and these two criteria were not set forth in the application for suspension.

83. Rule 10 of the Interim Rules says that the JCB may move for the suspension of a judicial officer, "If, when it authorizes the filing of formal charges, the JCB believes that ..." one of the above-mentioned criteria is met.

84. The JCB had not filed any formal charges against Justice Larsen. Therefore, pursuant to the JCB's Interim Rules, the JCB lacked the authority/power/jurisdiction to file the application for an order of suspension with or without pay.

85. On May 5, 1994, Justice Larsen filed his answer and new matter to the JCBIs application.

86. On May 16, 1994, the JCB filed a response to new matter.

87. On May 25, 1994, a hearing was held before the CJD. Exhibits showing the criminal information and jury verdicts were admitted into evidence.

88. Counsel for Justice Larsen moved that the hearing be bifurcated to allow the introduction of testimony at a later date. The CJD denied the motion.

89. On June 3, 1994, the CJD granted the application for an interim order directing the suspension of Justice Larsen without pay.

90. On June 6, 1994, the JCB filed with the CJD, "Board Complaint - Formal Charges" against Justice Larsen, alleging, among other things, matters alleged in his petitions for disqualification and recusal of Justice Zappala and Justice Cappy.

91. Article V, Section 18(b)(3), of the Pennsylvania Constitution, says that "the [CJD] shall proscribe general rules governing the conduct of members." Section 18(b)(4) says, "The [CJD] shall adopt rules to govern the conduct of the proceedings before the [CJD]. The CJD adopted such rules. Rule 2, "Scope of Rules," says, "These rules shall govern the conduct of all proceedings before the Court of Judicial Discipline."

92. The CJD did not adopt any rules for interim orders of suspension with or without pay; thus the CJD did not have the authority or jurisdiction to issue an interim order suspending Justice Larsen without pay. Additionally, the linchpin words of the suspension are"the words of the Constitution of Pennsylvania, i.e., "an indictment or information charging a felony," Article V, Section(d)(2). Nowhere is the word "conviction" used. When the CJD entered its order of March 25, 1994, denying suspension of Justice Larsen that adjudicated the matter and became the law of the

case -- nothing constitutionally had intervened to give any vitality to its June 3, 1994, suspension order. Additionally, the CJD reaffirmed its June 3, 1994, order of suspension by an order dated January 24, 1995.

93. When the CJD issued the interim suspension order without pay, it violated its own rules and acted beyond its Pennsylvania constitutional powers.

94. Pursuant to Article V, Section 18(d)(3), interim orders of suspension, with or without pay, are nonappealable. Therefore, no appeal process was available to Justice Larsen.

95. Additionally, the CJD and its members and the JCB and its members and employees have acted illegally and without jurisdiction in a manner harmful to Justice Larsen by wrongfully asserting by petitions, briefs, hearing dates and orders that they have jurisdiction over Justice Larsen's right to practice law in the Commonwealth of Pennsylvania.

96. On August 25, 1993, a per curium order was issued by the Supreme Court of Pennsylvania, by Chief Justice Nix and Justices John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, and Frank Montemuro, with Justice Larsen dissenting, appointing Joseph F. McCloskey, Carol K. McGinley, Peter DePaul and Dawson R. Muth to the CJD and appointing Joseph A. Del Sole, Frederick wells Hill, Gerald J. O'Connor, Andrew Palm, James E. Russo and Bernard C. Watson, to the JCB.

97. The appointments to the JCB and the CJD were done in an improper manner to deny Justice Larsen due process of law and equal protection of the law in the within proceedings.

98. Some members of the JCB and the CJD were appointed to serve because they had close ties to members of the Supreme Court, with the result that Justice Larsen was denied due process of law and equal protection of the law.

99. The actions and proceedings above, including the decisions to appoint members to the JCB and CJD who had close ties to Supreme Court members, to lodge improper charges against Justice Larsen, to issue an interim order suspending him without pay, and to take action with respect to his right to practice law, were in violation of the due process and equal protection clauses of the Fourteenth Amendment to United States Constitution.

Part II(b) - Larsen v. Supreme Court of Pennsylvania, Court of Judicial Discipline, and Judicial Conduct Board, et. al.

100. Paragraphs 1 - 99 above are incorporated by reference herein as if fully set forth at length.

101. The statements of Justice Larsen in his petitions for disqualification and recusal were substantial or motivating factors in the decisions to appoint members to the JCB and CJD who had close ties to Supreme Court members. to lodge improper charges against Justice Larsen, to issue an interim order suspending him without pay, and to take action with respect to his right to practice law.

102. Justice Larsen's statements involve matters of public concern, in that they involve the conduct and integrity of the Supreme Court, and those charged with investigating the conduct of the Supreme Court.

103. Justice Larsen was injured in that he was suspended without pay and improper action was taken against him with respect to his right to practice law.

104. Justice Larsen's statements in the petitions were protected by the speech and petition clauses of the First Amendment to the U.S. Constitution, and the decisions to appoint members to the JCB and CJD who had close ties to Supreme Court members, to lodge improper charges against Justice Larsen, to issue an interim order suspending him without pay, and to take action with respect to his right to practice law, were in violation of the First Amendment.

Part III(a) - Larsen v. Supreme Court of Pennsylvania, and Administrative Office of Pennsylvania Courts, et al.

105. The Supreme Court of Pennsylvania, Robert Nix, John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, Frank Montemuro and Ronald Castille are made defendants herein.

106. Administrative office of Pennsylvania Courts, Nancy M. Sobolevitch and David A. Frankfort er are made defendants herein.

107. In January 1974, when Justice Larsen became a member of the Pennsylvania judiciary, one of the terms and conditions of his service was a medical plan that provided lifetime medical benefits for members of the judiciary with 20 or more years of service, regardless of age.

108. On or about December 12, 1989, the Pennsylvania Supreme Court adopted a new medical insurance plan for retired members of the state judiciary.

109. The new plan provides lifetime benefits for members of the judiciary with 10 or more years of service, regardless of age.

110. Benefits under the new plan include "Fully State-Paid Basic & Specialized Coverage." "Basic" coverage includes hospital and medical expenses, etc. "Specialized" coverage includes dental, vision, hearing and prescription drug expenses.

111. As of December 12, 1989, Justice Larsen had served as a member of the judiciary for over 10 years. As a result, Justice Larsen's benefits vested as of December 12, 1989, and he was entitled to "Fully State-Paid Basic & Specialized Coverage" for life upon separation from the judiciary.

112. As of January 1994, Justice Larsen had served as a member of the judiciary for 20 years.

113. On or about June 17, 1994, defendant Frankforter, on behalf of the above defendants, informed Justice Larsen that he would no longer receive "Fully State-Paid Basic & Specialized Coverage" as of the close of business on June 3, 1994, on the purported basis of an amendment to Article V, Section 16, of the Pennsylvania Constitution, effective August 18, 1993.

114. The constitutional amendment above had no effect on Justice Larsen's entitlement to "Fully State-Paid Basic

& Specialized Coverage which vested as of December 12, 1989.

115. Defendants violated the equal protection clause of the Fourteenth Amendment by denying Justice Larsen "Fully State-Paid Basic & Specialized Coverage," to which he was entitled for his lifetime. other members of the judiciary, who qualified for lifetime benefits and were later removed from office under similar circumstances, continue to receive state-paid medical benefits, whereas Justice Larsen does not.

116. Defendants violated the impairment of contracts clause of the U.S. Constitution by denying Justice Larsen continued "Fully State-Paid Basic & Specialized Coverage," to which he was entitled, in applying the amendment to Article V, Section 16, of the Pennsylvania Constitution, effective August 18, 1993, retroactively to Justice Larsen, whereas his lifetime entitlement to "Fully State-Paid Basic & Specialized Coverage," had become vested as of December 12, 1989.

117. Defendants violated the due process clause by arbitrarily denying Justice Larsen "Fully State-Paid Basic & Specialized Coverage," to which he was entitled.

118. Justice Larsen was offered the opportunity to establish a direct-pay medical insurance policy as a participant in the community-based medical insurance program which Blue Cross/Blue Shield offered.

119. Justice Larsen's payments under this option were much higher than if he was participating in the Commonwealth's group plan and his benefits were significantly lower. A direct-pay plan did not exist for specialized coverage,

therefore, he was unable to obtain dental, vision, hearing and prescription drug insurance other than on a individual basis.

120. As a result of defendants' wrongful denial of Justice Larsen's medical benefits, he has incurred many thousands of dollars in medical expenses he would not have incurred if he had remained covered under "Fully State-Paid Basic & Specialized Coverage."

Part III(b) - Larsen v. Supreme Court of Pennsylvania, and Administrative Office of Pennsylvania Courts, et al.

121. Paragraphs 105 - 120 above are incorporated by reference herein as if fully set forth at length.

122. 42 U.S.C., Section 300bb-1, et. seq., provides that state and local government group health plans must provide continuation coverage to certain individuals such as Justice Larsen. Coverage must consist of coverage which, as of the time the coverage is being provided, is identical to the coverage provided under the plan to similarly situated beneficiaries with respect to whom a qualifying event has not occurred. Such coverage shall be for 18 months. Justice Larsen was also denied this coverage by defendants.

123. No qualifying event occurred within the meaning of 42 U.S.C., Section 300bb-1.

124. Defendants' wrongful denial of Justice Larsen's medical benefits constitutes a violation of 42 U.S.C., Section 300bb-1, et. seq., in that he was not afforded identical coverage.

125. As a result of defendants' wrongful denial of Justice Larsen's medical benefits, he has incurred many

thousands of dollars in medical expenses he would not have incurred if he had remained covered under "Fully State-Paid Basic & Specialized Coverage."

Part III(c) - Larsen v. Supreme Court of Pennsylvania, and Administrative Office of Pennsylvania Courts, et al.

126. Paragraphs 1 - 125 above are incorporated by reference herein as if fully set forth at length.

127. The statements of Justice Larsen in his petitions for disqualification and recusal were substantial or motivating factors in the decisions to deny him "Fully State-Paid Basic & Specialized Coverage" for his lifetime under the medical plan, and to deny him such coverage for at least 18 months under PHSA.

128. Justice Larsen's statements involve matters oil public concern, in that they involve the conduct and integrity of the Supreme Court, and those charged with investigating the conduct of the Supreme Court.

129. Justice Larsen was injured in that he was denied medical benefits to which he was entitled, and he incurred thousands of dollars in medical expenses.

130. Justice Larsen's statements in the petitions were protected by the speech and petition clauses of the First Amendment to the U.S. Constitution, and the decisions to deny him "Fully State-Paid Basic & Specialized Coverage" for his lifetime under the medical plan, and to deny him such coverage for at least 18 months under PHSA, were in violation of the First Amendment.

WHEREFORE, plaintiff Rolf Larsen demands judgment in his favor as follows:

(1) against the Senate and Senators in their official capacities, granting declaratory and injunctive relief, voiding the Senate impeachment verdict of guilty on Article !I;

(2) against the Senators in their personal capacities, awarding damages including loss of past and future wages and benefits, emotional harm, injury to reputation, and counsel fees;

(3) against the Supreme Court, Court of Judicial Discipline, Judicial Conduct Board, and all individual members, in their official capacities, granting declaratory and injunctive relief: (i) voiding the Court of Judicial Discipline's order dated June 3, 1994, of suspension without pay; (ii) voiding the appointments to the Judicial Conduct Board and the Court of Judicial Discipline; and, (iii) voiding the action of interfering with Plaintiff's right to practice law;

(4) against the Supreme Court, Court of Judicial Discipline, Judicial Conduct Board, and all individual members, in their personal capacities, awarding damages, including loss of past and future wages and benefits, emotional harm, injury to reputation, and counsel fees;

(5) against the Supreme Court and individual justices and Administrative Office and individual members in their official capacities, granting declaratory and injunctive relief, voiding the action of terminating plaintiff's health and medical benefits;

(6) against the Supreme Court and individual justices and Administrative office and individual members in their personal capacities, awarding damages for medical expenses incurred by plaintiff from June 4, 1994, to date; and,

(7) against all individual defendants in their personal capacities for punitive damages and such other relief as the court may find appropriate.

Plaintiff also demands attorneys fees and costs of litigation for this action against all defendants, pursuant to 42 U.S.C., Section 1988.

Dated: February 26, 1996. /s/ Michael S. Fettner

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(2)

Supreme Court, U.S.
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No. 98-988

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

ROBERT N.C. NIX, et al.,

Petitioners,

v.

ROLF LARSEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This is an action, among other claims, by a former justice of the Pennsylvania Supreme Court against seven other justices of the Supreme Court (three now retired) and two officials of the Administrative Office of Pennsylvania Courts, seeking declaratory and injunctive relief, voiding the action of revoking respondent Rolf Larsen's retirement medical benefits, and awarding him damages for medical expenses incurred from June 4, 1994, to date of judgment.[1]

Petitioners are Justices Flaherty, Zappala, Cappy and Castille, and former Justices Nix, Papadakos and Montemuro, court administrator Nancy M. Sobolevitch, and manager of human resources of the Court Administrator's Office, David A. Frankforter.

ADDITIONAL STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983:

"Every person who under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . "

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[1]Mr. Larsen has filed a petition for writ of certiorari, No. 98-1038, seeking review of the decision granting Senators of the Commonwealth of Pa., absolute legislative immunity as to impeachment proceedings described *infra*. *Larsen v. Senate*, 152 F.3d 240 (3d Cir. 1998).

COUNTER STATEMENT OF THE CASE

Nature of Action

By letter dated June 17, 1994, petitioners informed Mr. Larsen that, as of the close of business on June 3, 1994, he had become ineligible to receive retirement medical benefits.

Mr. Larsen alleges that revoking these benefits violated his rights under the Impairment of Contracts and Due Process clauses. Mr. Larsen alleges that statements made by him, protected under the First Amendment, were substantial or motivating factors in the decision to revoke his benefits.

Petitioners are not entitled to qualified immunity for revoking Mr. Larsen's benefits, because it was clearly established as of June 17, 1994, and reasonable officials would have known, that revoking Mr. Larsen's benefits violated his constitutional rights to such benefits.

Counter Statement of Facts

In November 1973, Mr. Larsen was elected to a ten-year term as a judge on the Court of Common Pleas, Allegheny County, Pennsylvania, and served there from January 1974, to January 1978.

As of January 1974, one of the terms and conditions of judicial service was a medical plan that provided lifetime medical benefits for members of the judiciary with 20 or more years of service, regardless of age.

In November 1977, Mr. Larsen was elected to a 10-year term as a justice on the Supreme Court of Pennsylvania. In November 1987, Mr. Larsen won a retention election for an additional 10-year term beginning in January 1988.

On or about December 12, 1989, the Pennsylvania Supreme Court adopted a new medical insurance plan for members of the state judiciary. The new plan provides lifetime benefits for members of the judiciary with 10 or more years of service, regardless of age.

Benefits under the new plan include "Fully State-Paid Basic & Specialized Coverage." "Basic" coverage includes hospital and medical expenses, etc. "Specialized" coverage includes dental, vision, hearing and prescription drug expenses.

As of December 12, 1989, Mr. Larsen had served as a member of the judiciary for over 10 years. As a result, Mr. Larsen's benefits vested as of December 12, 1989, and he was entitled to "Fully State-Paid Basic & Specialized Coverage" for life upon separation from the judiciary.

On October 14, 1992, the Supreme Court, by Justices Zappala and Cappy, with Justice Papadakos dissenting, in a disciplinary matter, reprimanded Mr. Larsen for creating, without improper motive, an appearance of impropriety. *Matter of Larsen*, 532 Pa. 326, 616 A.2d 529 (1992).

On November 24, 1992, in the above disciplinary matter, Mr. Larsen filed and served a "Petition for Reargument" and a "Petition for Disqualification and Recusal of Justice Zappala and Justice Cappy." Mr. Larsen filed and served supplemental and second supplemental petitions on December 14, 1992, and January 7, 1993, respectively. The petitions (among other things) alleged relevant acts of impropriety by Justices Zappala and Cappy. The nature of the acts alleged against Justices Zappala and Cappy required them to recuse themselves in the disciplinary matter against Mr. Larsen.

The petitions also alleged (among other things) acts of

impropriety by Chief Justice Nix, including that he improperly interfered in the pending trial in *Commonwealth of Pennsylvania v. David Lee Yohn*, and that the Supreme Court, including Justices Zappala and Cappy, improperly handled Yohn's petition for allowance of appeal over the course of three and one-half years, eventually denying Yohn's petition. *See, Yohn v. Love, infra*. The improper handling of the Yohn petition required Justices Zappala and Cappy to recuse themselves in the Larsen disciplinary matter.

The petitions also alleged that, despite the obvious improper behavior of Chief Justice Nix, no investigation was undertaken, nor were any charges brought, against Chief Justice Nix.

In January 1993, Rep. Christopher K. McNally filed a Petition in the Pennsylvania House of Representatives ("House"), calling for Mr. Larsen's impeachment, and accusing him of violations of the Code of Judicial Conduct.

On May 18, 1993, the electorate in the Commonwealth of Pennsylvania adopted an amendment to Article V, § 16(b), of the Pennsylvania Constitution, changing the judicial discipline system, effective August 18, 1993.

On October 28, 1993, Mr. Larsen was charged with criminal conspiracy and 28 other violations of the Pennsylvania Controlled Substances Act, alleging that he had obtained medically needed prescription medications (tranquilizers) for his own use, whereby his personal physician issued prescriptions in the names of other persons (with their consent) to protect his privacy. That same day, the Supreme Court relieved him from all judicial duties (suspended), but he continued to receive his full salary and all health and medical benefits. See page 25 *infra* for legal significance.

On November 23, 1993, the House adopted House Resolution No. 205, authorizing its judiciary committee to investigate conduct allegedly committed by Mr. Larsen. After public hearings and investigation, the judiciary subcommittee on courts issued a report and recommendation.

As of January 1994, Mr. Larsen had served as a member of the judiciary for 20 years.

On March 10, 1994, the Judicial Conduct Board filed an application with the Court of Judicial Discipline for an interim order requesting the suspension of Mr. Larsen without pay. On March 25, 1994, the Court of Judicial Discipline denied the application.

On April 9, 1994, following trial in the Court of Common Pleas, Allegheny County, PA, Mr. Larsen was convicted of two counts of criminal conspiracy with his doctor, Earl A. Humphreys, M.D., the unindicted co-conspirator, to issue medically needed prescriptions (tranquilizers) in the names of third parties (with their consent) so as to protect Mr. Larsen's privacy. Privacy was medically necessary for successful treatment. Mr. Larsen was acquitted of all other charges.

DEA revoked Dr. Humphreys's certificate to write prescriptions for controlled substances, but this decision was reversed and remanded by the Third Circuit for a new hearing directing that the issue of patient privacy be taken into account. *Humphreys v. D.E.A.*, 96 F.3d 658 (3d Cir. 1996).[2] Dr. Humphreys has since died.

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[2]Paradoxically, the Allegheny County judge who presided over Mr. Larsen's criminal trial, W. Terrance O'Brien, did not permit Mr. Larsen to introduce any evidence of privacy to show, among other things, lack of criminal intent. Appeal on the matter is pending.

On April 22, 1994, the House subcommittee on courts recommended to the entire House a resolution to impeach Mr. Larsen.

On May 18, 1994, House Resolution 324 was introduced, listing seven Articles of Impeachment, and was adopted by the House on May 24, 1994.

As of June 1994, Mr. Larsen was in the seventh year of his second term and next in line to be Chief Justice of Pennsylvania.

On June 3, 1994, upon the application of the Judicial Conduct Board, the Court of Judicial Discipline issued an order directing the suspension of Mr. Larsen without pay.

On June 6, 1994, the Senate received the Articles of Impeachment from the House Managers, and appointed an impeachment committee ("the Committee").

On June 13, 1994, in the criminal action, Mr. Larsen was sentenced to probation, community service, removal from office,[3] and payment of costs. On August 5, 1996, the Superior Court of Pennsylvania vacated sentence and remanded for sentencing based on only one conspiracy count, not two. In May 1997, Judge O'Brien imposed the same sentence as he originally imposed on June 13, 1994. The matter is pending in Superior Court.

On June 17, 1994, Mr. Frankforter, on behalf of himself, Ms. Sobolevitch and Supreme Court justices, notified Mr.

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[3]In Pennsylvania, if a public official is convicted of "an infamous" crime, then he may be removed from office. The criminal trial judge "deemed" Mr. Larsen's criminal conspiracies to be an "infamous" crime.

Larsen that he would no longer receive "Fully State-Paid Basic & Specialized Coverage" as of the close of business on June 3, 1994.

On August 8, 1994, while the Senate was not in session, the Senate Committee began evidentiary hearings on the Articles of Impeachment. The hearings took place in the Senate chamber in the Capitol in Harrisburg, PA. Evidentiary hearings were held on 17 separate days, and concluded on September 9, 1994.

The Committee pre-trial and the Senate post-trial refused Mr. Larsen's requests that a standard of proof be established and that rules of evidence be adopted [A121-A122, ¶¶ 58(d) and 58(e)]. The Senate concluded it could decide the impeachment charges on the following source of the "evidence:" "Everybody knows what they know. They know from wherever they found it."

On October 4, 1994, the Senate convicted Mr. Larsen on Article II, but acquitted him on the other six Articles, including Article VI, which included the conspiracy count on which he was convicted in the Allegheny County criminal proceeding. The Senate then voted unanimously to bar Mr. Larsen from holding any office of trust or profit in Pennsylvania.

Other members of the judiciary, who qualified for lifetime benefits and were later removed from office under similar circumstances, continue to receive state-paid medical benefits, whereas Mr. Larsen does not.

Mr. Larsen's payments for his present medical coverage is much higher than if he was participating in the Commonwealth's group plan and his present benefits are significantly lower.

On May 5, 1995, the U.S. District Court for the Eastern District of Pa. granted the writ of habeas corpus sought by David Lee Yohn. *Yohn v. Love*, 887 F.Supp. 773 (E.D.Pa.), affirmed, 76 F.3d 508 (3d Cir. 1996).

The district court said: Chief Justice Nix's interference in Yohn's trial was "particularly egregious" and "nothing other than a gross abuse of the jurisdictional limits of his power;" the "Supreme Court's handling of [Yohn's] petition [for allocatur] was, at the very least, unprincipled;" and, "several holds were placed on the petition, in large part to avoid the embarrassment of airing the internal disputes of the Supreme Court publicly."

Procedural History

On September 13, 1995, Mr. Larsen filed his complaint in this action under 42 U.S.C. § 1983[4] against petitioners

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[4]Petitioners' counsel's comment at p. 5, n.2, that Mr. Larsen brought suit under § 1983 rather than under state contract law "to qualify for counsel fees" is misleading, incorrect and gratuitous. The comment wrongly suggests that Mr. Larsen's counsel made the statement, whereas in fact, the statement was baseless speculation made by defense counsel. Mr. Larsen was entitled to pursue his remedies under federal constitutional law, especially since the court of last resort in any action in state court, that is, the Supreme Court of Pennsylvania, included and still includes a majority of the justices he was suing. Moreover, these same justices have supervisory powers over all the Pennsylvania lower court judges, which powers included assigning all judges to particular trial divisions, assigning particular judges to particular cases, appointing all administrative judges, and appointing senior judges. Each individual justice may veto any of these appointments by asserting what is called a "personal" (no reason need exist nor be given to the other justices to accomplish this veto).

and others. On February 26, 1996, Mr. Larsen filed his amended complaint. On March 18, 1996, petitioners moved to dismiss on various grounds.

On February 28, 1997, the district court denied petitioners' motions to dismiss based on qualified immunity. *Larsen v. Senate*, 955 F.Supp. 1549 (M.D.Pa.), on reconsideration, 965 F.Supp. 607 (M.D.Pa. 1997).

On August 11, 1998, the court of appeals affirmed in part and reversed in part the district court's orders as to qualified immunity of petitioners. *Larsen v. Senate*, 154 F.3d 82 (3d Cir. 1998). On September 28, 1998, the court of appeals denied the petition of the justices for rehearing. On December 18, 1998, the instant petition was docketed in this court.

REASONS WHY THE PETITION FOR A WRIT SHOULD BE DENIED

This court should not review the question of qualified immunity because the Third Circuit decision in *Larsen v. Nix et al.*, correctly applied the "clearly established" standard, consistent with recent decisions of this court, and correctly applied the Supreme Court of Pennsylvania's jurisprudence on entitlement to vested retirement benefits.

This court should not review the Third Circuit decision because the court of appeals did not render "a decision in conflict with a decision of another court of appeals on the same important matter." This is in contrast to two cases cited by petitioners [p. 7] in which certiorari was granted this term, where the Fourth and Ninth Circuits reached different results on the "same important matter." *Berger v. Hanlon*, 129 F.3d 505, 511 (9th Cir. 1998), and *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998)(en banc), *cert. granted* and

actions consolidated, 119 S.Ct. 443 (1998).[5]

Petitioners are confused; they are distorting and twisting the case law in order to make this case fit into one of the "compelling reasons" why this court will grant a petition for review, that is, conflicting decisions among the circuits "on the same important matter." See, Supreme Court Rule 10(a). Petitioners have not cited a decision from another court of appeals that is in conflict with the decision in this case.

Petitioners' "split-between-the-circuits" rationale for granting certiorari is flawed for two reasons. First, the purported holdings of the Fourth, Sixth and Eleventh Circuits are miscited, and second, the decision of the Third Circuit in this action does not conflict with the purported or actual holdings of any circuit. Moreover, petitioners' discovery of the purported conflicts is a "Road to Damascus" experience on their way to this court. Petitioners failed to cite the purported conflicting circuit court holdings below, even in their petition for rehearing in the Third Circuit. Petitioners did not argue in the district court or the court of appeals that the "clearly established" standard requires decision by this court, the Third Circuit, or the Supreme Court of

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[5]The "same important matter" is whether the Fourth Amendment right to be free from unreasonable search and seizure was clearly established to include searches with media present. *Berger* held agents were not entitled to qualified immunity, *Wilson* held police officers were entitled to qualified immunity. This issue has received much attention by the courts of appeals, which was likely a factor in this court's decision to grant the writs of certiorari. *Berger* cited *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), *Stack v. Gillian*, 96 F.3d 159 (6th Cir. 1996), *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), and the panel decision in *Wilson*, 110 F.3d 1071 (4th Cir. 1997). *Berger* was decided (11/13/97) before *Wilson* was decided *en banc* (4/8/98).

Pennsylvania.

Petitioners assert (p. 6) that "The Fourth, Sixth, and Eleventh Circuits, for example, have adopted a 'bright line' test, holding that an individual's rights are "clearly established" only when a materially similar case has been decided by the [Supreme] Court, the Court of Appeals of the respective circuit, or the highest court in the state where the alleged wrongdoing took place [emphasis supplied]."

The actual holding of the Fourth Circuit is:

> ". . . the fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was nevertheless 'clearly established' for qualified immunity purposes and that 'clearly established' in this context includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked. The law is clearly established such that an officer's conduct transgresses a bright line when the law has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state."

Wilson, 141 F.3d at 114, citations and internal quotations omitted.

The actual holding of the Sixth Circuit is:

> "*Ordinarily*, at least, in determining whether a right is 'clearly established' this court will not look beyond Supreme Court or Sixth Circuit precedent [emphasis supplied]."

Cullinan v. Abramson, 128 F.3d 301, 311 (6th Cir. 1997).

The actual holdings of the Eleventh Circuit are:

> "We can imagine an exceptional case where 'the words of a federal statute or federal constitutional provision will be specific enough to establish law applicable to particular circumstances clearly and to overcome qualified immunity *even in the absence of case law* [emphasis supplied].'"

Santamorena v. Georgia Military College, 147 F.3d 1337, 1340 n.4 (11th Cir. 1998), citing *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1150 n.4 (11th Cir. 1994)(en banc). The Eleventh Circuit has also held:

> "In this circuit, the law can be 'clearly established' for qualified immunity purposes only by decisions of the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose."

Jenkins v. Talladega City Bd of Ed., 115 F.3d 821, 827 n.4 (11th Cir.1997), citations and internal quotations omitted.

The Third Circuit's decision in this action lacks a holding on the issue, and therefore cannot be considered to be a decision in conflict with any other court, within the meaning of Supreme Court Rule 10(a). Moreover, the decision of the Third Circuit is well-grounded in decisions of this court[6], the

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[6]The Third Circuit decision relied upon: *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977) [A19], *Mississippi v. Miller*, 276 U.S. 174 (1928) [A18], and *Fisk v. Police Jury of Jefferson*, 116 U.S. 131 (1885) [A19], for the right that one's contract cannot be impaired; *Board of Regents v. Roth*, 408 U.S. 564 (1972) [A22], and *U.S. Trust Co., supra* [A22], for the right to due process before deprivation of a contractual right;

Third Circuit[7], and the Supreme Court of Pennsylvania.[8]

Contrary to petitioners' suggestion (pp. 6,7,13), the Third Circuit did not hold that dicta was clearly established law. The Third Circuit [A20-A21, n.13] merely marshalled dictum in further support of its conclusion that medical benefits are to be treated in the same manner as other retirement benefits,

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and, *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977) [A26], and *Givhan v. Eastern Line Consol. Sch. Dist.*, 439 U.S. 410 (1979) [A27], for the right to be free from retaliation for protected speech.

[7]The Third Circuit relied upon its own decisions: *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995), and *Kelly v. Borough of Sayreville*, 107 F.3d 1073 (3d Cir. 1997) [A22], for the right to due process before deprivation of property rights; and, *Feldman v. Philadelphia Housing Auth.*, 43 F.3d 823 (3d Cir. 1994) [A26], *In re City of Philadelphia Lit.*, 49 F.3d 945 (3d Cir. 1995), *Sheppard v. Beerman*, 94 F.3d 823 (3d Cir. 1996) [A27], *Azzaro v. County of Allegheny*, 110 F.3d 968 (3d Cir. 1997) [A28], and *Bradley v. Pittsburgh Bd. of Ed.*, 913 F.2d 1064 (3d Cir. 1990) [A29], for the right to be free from retaliation for protected speech.

[8]The Third Circuit relied upon Supreme Court of Pennsylvania decisions, in holding that Mr. Larsen had a vested contractual right to retirement medical benefits: *Glancey v. Com. State Retirement Bd*, 530 Pa. 520, 610 A.2d 15 (1992), *Bellomini v. State Retirement Board*, 498 Pa. 204, 445 A.2d 737 (1982), *Harvey v. Allegheny County Retirement Board*, 392 Pa. 421, 141 A.2d 197 (1958), *Wright v. Allegheny County Retirement Bd*, 390 Pa. 75, 134 A.2d 231 (1957) [A13], *Zimmerman v. Officers & Employees Retirement Board*, 501 Pa. 293, 461 A.2d 593 (1983) [A15], *Ass'n of Pa. State College & Faculties v. State System of Higher Education*, 505 Pa. 369, 479 A.2d 962 (1984) [A17], and *McBride v. Allegheny County Retirement Board*, 330 Pa. 402, 199 A. 130 (1938) [A19].

that is, they are "materially similar" or are "manifestly included within more general applications of the core constitutional principle invoked." Thus, the Third Circuit's approach was consistent with what petitioners say the law is in other circuits.

If a so-called "bright-line" test is applied, requiring precedent of a state's highest court in "materially similar" cases, that standard was met here, because the Supreme Court of Pennsylvania has created a "bright line" whereby a vested contractual right to medical benefits may not be impaired by law enacted after vesting.

Third Circuit application of "clearly established" standard is consistent with the law of this court and of its sister circuits

Qualified immunity protects a governmental official from liability for damages for acts taken in performance of his discretionary functions if his conduct has not violated "clearly established" rights of which a reasonable person would have been aware. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Anderson v. Creighton, 483 U.S. 635, 640 (1987), amplified *Harlow*, and is now the polestar of the "clearly established" standard, and said:

> "A right is 'clearly established' for qualified immunity purposes only if '[t]he contours of the right' are sufficiently clear that a reasonable official would understand that what he is doing violates that right."
>
> ". . . the 'clearly established' standard does not require that 'the very act in question has previously been held unlawful.'"

Anderson has been applied, for examples, in *Carver v. Foerster*, 102 F.3d 96 (3d Cir. 1996); *Pro v. Donatucci*, 81 F.3d 1283 (3d Cir. 1996); *In re City of Philadelphia Lit.*, 49 F.3d 945 (3d Cir. 1995). *Acierno v. Cloutier*, 40 F.3d 597 (3d Cir. 1994); *Good v. Dauphin Cty. Services*, 891 F.2d 1087 (3d Cir. 1989).

The Third Circuit decisions in this case and cases above [A10-11] are consistent with recent decisions of this court, including *Crawford-El v. Britton*, 118 S.Ct. 1584 (1998)[9], and *United States v. Lanier*, 520 U.S. 259, 117 S.Ct. 1219, 1227 (1997)(equating the "clearly established" immunity standard in civil law with the "fair warning" standard in criminal law).

The Third Circuit decisions in this case and cases cited above, applying the "clearly established" standard, are consistent with the decisions of the courts of appeals cited by petitioners (although petitioners' authority is not on point with this case). *Berger, supra* (Fourth Amendment, applying only *Harlow*); *Wilson, supra* (Fourth Amendment, applying *Anderson*); *Santamorena, supra* (in action based on rape by a student of another student at state military college, Fourteenth Amendment Due Process right was not clearly established that the voluntary custodial arrangement between school and student gave rise to a constitutional right to protect students); *Lassiter, supra* (under Fourteenth Amendment Due Process, not clearly established that university vice president had property interest in his position, applying *Anderson*, and making reference to, but not

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[9]Petitioners' contention that this action should be remanded because the Third Circuit did not cite *Crawford-El*, is misplaced. *Crawford-El* held that plaintiff need not adduce clear and convincing evidence of improper motive to defeat official's summary judgment motion claiming qualified immunity.

applying, "bright-line" test); *Horne v. Coughlin*, 155 F.3d 26, 30 (2d Cir. 1998)(in prisoner action, law not clearly established under Fourteenth Amendment Due Process or Eighth Amendment, applying only *Harlow*, but not "bright-line" test); *Brewster v. Bd of Ed of Lynwood*, 149 F.3d 971, 977 (9th Cir. 1998) (teacher's rights under First Amendment and Fourteenth Amendment Due Process were not clearly established, applying *Anderson*, but not "bright-line" test); *Gabbert v. Conn*, 131 F.3d 793 (9th Cir. 1997), *cert. granted*, 119 S.Ct. 39 (1998)(Fourth and Fourteenth Amendment rights in search of and interference with lawyer representing grand jury witness, applying *Anderson*, but not "bright-line" test); *Harris v. Roderick*, 126 F.3d 1189, 1196-98 (9th Cir. 1997)(Fourth Amendment excessive use of force, no reference to *Anderson* or "bright-line" test); *Jenkins v. Talladega City Bd of Ed., supra*, 115 F.3d at 823 (Fourth Amendment search of elementary school students, applying *Anderson*, but not "bright-line" test); *Wilson v. Meeks*, 52 F.3d 1547, 1552-55 (10th Cir. 1995)(Fourth Amendment excessive use of force, applying *Anderson*, but not "bright-line" test); *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 589-590 (6th Cir. 1994)(Fourth Amendment search and seizure case, applying *Anderson*, and referring to "bright-line" test for determining the line between investigatory detention and arrest).

Impairment of contract

In the courts below, petitioners contended (1) the applicable law was not clearly established, because the right to receive benefits applied only to "retired" members of the judiciary, and Mr. Larsen was not "retired" [A12]; (2) that petitioners could have believed their revocation of Mr. Larsen's medical benefits was lawful under the 1993 amendment of Article V, § 16(b) [A14]; and, (3) the law was not clearly established that retirement medical benefits were

to be treated in the same manner as other forms of retirement benefits [A20].

The 1993 amendment to Article V, § 16(b) of the Pennsylvania Constitution of 1968, does not apply to Mr. Larsen because § 16(b) became effective (on August 18, 1993) *after* Mr. Larsen's rights had vested on about December 12, 1989, when the Pennsylvania Supreme Court adopted a new medical insurance plan providing lifetime retirement benefits for members of the judiciary with 10 or more years of service, regardless of age.

As of December 12, 1989, Mr. Larsen had served as a member of the judiciary for over 10 years (since January 1974). As a result, his benefits vested as of December 12, 1989, and he was entitled to "Fully State-Paid Basic & Specialized Coverage" for life upon separation from the judiciary.

The 1993 amendment to § 16(b) also superseded Article V, § 18(h), which said that upon removal or suspension of a justice from office, "his *salary* shall cease from the date of such order." Thus, before the 1993 amendment, the Pa. Constitution had no provision that *deferred compensation* would not be paid.

It was clearly established as of June 17, 1994, that states do not have power to impair the obligations of parties to a contract, including a contract between a state and a citizen.

Article I, § 10, clause 1, of the U.S. Constitution, says:

"No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

Inquiry under the Contract Clause is whether (a) there is

a contractual relationship, (b) a change in the law that impairs that relationship, and (c) the impairment is substantial. *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 244-45 (1978).

The Contract Clause limits the power of states to modify their own contracts. *See*, *Fisk v. Police Jury of Jefferson*, 116 U.S. 131 (1885); *Houston & Texas RR. v. Texas*, 177 U.S. 66, 99-101 (1900); *Mississippi v. Miller*, 276 U.S. 174 (1928)(constitutional protection extends to retroactive application of law that would take from state official an amount he had theretofore earned); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938)(repeal of teachers tenure law operates as impairment of teacher's contract with state); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977); *Ass'n of Pa. State College & Faculties v. State System of Higher Education*, 505 Pa. 369, 479 A.2d 962 (1984); *accord*, *Rhode Island Nat. Ed. Assoc. v. Retirement Board*, 890 F.Supp. 1143, 1162-66 (D.R.I. 1995), citing decisions rendered before June 17, 1994.[10]

Here, there are no questions (a) of a contractual relationship between Pennsylvania and Mr. Larsen; (b) that application of the 1993 amendment, Art. V, § 16(b), to Mr. Larsen, would impair that relationship by revoking Mr. Larsen's right to deferred compensation for services already rendered, in the form of retirement medical benefits; and, (c) that the impairment is substantial.

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[10]*Dodge v. Bd. of Ed. of Chicago*, 302 U.S. 74 (1937), seems to be on point, but, in fact, is not. *Dodge* affirmed an Illinois statute that decreased the amounts of annuity payments to retired teachers, on the ground that the statute did not create any contractual or vested rights, but rather, was a declaration of legislative policy, under which payments made were gratuities.

General principles of entitlement to retirement benefits

Pennsylvania has long recognized that the right to receive retirement benefits is contractual because "retirement provisions for public employees is that of deferred compensation for service actually rendered in the past. *Bellomini v. State Retirement Board*, 498 Pa. 204, 445 A.2d 737, 739 (1982); *McKenna v. State Employees Retirement Bd*, 495 Pa. 324, 433 A.2d 871, 877 (1981); *Harvey v. Allegheny County Retirement Board*, 392 Pa. 421, 141 A.2d 197, 203 (1958); *Wright v. Allegheny County Retirement Bd*, 390 Pa. 75, 134 A.2d 231, 233 (1957); *Baker v. Retirement Board of Allegheny County*, 374 Pa. 165, 97 A.2d 231 (1953); *McBride v. Allegheny County Retirement Board*, 330 Pa. 402, 199 A. 130 (1938); *Retirement Board of Allegheny County v. McGovern*, 316 Pa 161, 174 A. 400 (1934)." *Zimmerman v. Officers & Employees Retirement Board*, 501 Pa. 293, 461 A.2d 593, 595 (1983). Petitioner Nix authored *Zimmerman*.

It was clearly established in Pennsylvania as of June 17, 1994, that when a state employee's rights to retirement benefits are vested, he is unaffected by subsequent changes in legislation changing the terms of the retirement contract. *Bellomini, supra*, 445 A.2d at 739.

It was clearly established in Pennsylvania as of June 17, 1994, that where a public employee's right to receive benefits has vested, any attempt later to interfere with that right constitutes an unconstitutional impairment of contract. *Harper v. State Employees Retirement System*, 154 Pa.Cmwlth. 573, 624 A.2d 279 (1993), affirmed, 538 Pa. 520, 649 A.2d 643, 645 n.4 (1994); *Ass'n of Pa. State College & Faculties v. State System of Higher Education*, 505 Pa. 369, 479 A.2d 962, 965 (1984); *Harvey, supra*, 141 A.2d at 203.

State College, supra, held that legislation ("§ 7") requiring state employees, who were members of the retirement system before the legislation went into effect, to make an additional wage contribution of 1.25% to the retirement system, impaired the contract rights of all members of the system:

> "It has long been recognized in Pennsylvania that the nature of the retirement provisions for public employees is that of deferred compensation for service actually rendered in the past. [citations omitted].
>
> "Since § 7 reduces the value of members' retirement benefits, it is unquestionably a unilateral modification in the System adverse to its members and is void as applied to employees whose contractual rights were vested prior to its enactment."

Petitioner Nix authored *State College* and was joined by petitioners Flaherty, Zappala and Papadakos.

Harper, supra, held that legislators who took office before a statutory change in pension benefits were permitted to retain their pension status, in order to avoid an unconstitutional impairment of contract. Only legislators who took office after the change received the new reduced benefits package.

Harvey, supra, held an employee who has complied with all conditions necessary to receive a retirement allowance cannot be affected adversely by subsequent legislation which changes the terms of the retirement contract.

It was clearly established in Pennsylvania as of June 17, 1994, that "vesting" of public retirement benefits occurs when an employee has made all required contributions and has completed the number of years of service required for

eligibility. *Police Pension Fund v. Hess*, 127 Pa.Cmwlth. 498, 562 A.2d 391, 395 (1989), citing *Hickey v. Pittsburgh Pension Bd*, 378 Pa. 300, 106 A.2d 233 (1954).

Principles applied to Pa. judiciary

"Retirement benefits are not a gratuity; they are deferred compensation and should be viewed as such. To change the terms by which retirement benefits are calculated strikes at the heart of the compensation package." *McKenna, supra*, 433 A.2d at 877 (petitioner Flaherty).

It had been clearly established in Pennsylvania as of June 17, 1994, that "retirement benefits," including pension benefits, "are founded upon a contract theory of deferred compensation." *Glancey v. Com. State Retirement Bd*, 530 Pa. 520, 610 A.2d 15, 22-23 n.16 (1992). "Loss of retirement benefits, particularly where an individual has invested many years of service on the bench, is a serious matter. It strips an individual of his or her expectation in remuneration for services already performed." 610 A.2d at 25. Petitioner Cappy authored the majority opinion in *Glancey* and was joined by petitioners Nix, Flaherty, Zappala and Papadakos.

Glancey, supra, decided May 18, 1992, held that judges removed from office for disciplinary reasons (pursuant to the former constitutional procedures involving the Judicial Inquiry and Review Board and Supreme Court), did not forfeit their pension benefits by operation of (former) Art. V, §§ 16(b) and 18(h), prohibiting compensation to judges removed from office, because "compensation," within the meaning of (former) § 16(b), did not include pensions or

retirement benefits, but only "salary."[11]

A reading of the Pennsylvania retirement cases clearly shows that there are two kinds of retirement benefits: (a) pension benefits and (b) medical and health benefits. Both kinds of benefits are governed by the same legal principles. For examples, see *Snyder and Shiomos v. Administrative Office of Pa. Courts*, 132 Pa.Cmwlth. 382, 572 A.2d 1313 (1990)(decision as to retirement medical benefits), and *Snyder and Shiomos v. State Retirement Board*, 128 Pa.Cmwlth. 100, 562 A.2d 1000 (1989)(decision as to retirement pension benefits); *Shiomos v. State Retirement Board*, 533 Pa. 588, 626 A.2d 158, 159 n.4, 160 n.7 (1993)(in opinion authored by petitioner Cappy and joined by petitioners Nix, Flaherty and Zappala, equated forfeiture of pension benefits with forfeiture of medical benefits and affirmed Commonwealth Court's reversal of the actions of the Employees Retirement Board and the Administrative Office); *Bellomini, supra*.

By revoking Mr. Larsen's rights to receive lifetime medical benefits after leaving office, petitioners applied § 16(b) to work a forfeiture of compensation for service Mr. Larsen had already rendered to Pennsylvania.

Although the Third Circuit correctly rejected the contention of petitioners that "it was not clearly established

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[11] *Glancey* involved actions known as the "roofers union cases," where numerous judges were removed from office by the Supreme Court of Pennsylvania for receiving cash ("gifts under the table"). Such removals were considered involuntary retirement. These judges were denied their pensions and medical benefits and appealed to Commonwealth Court of Pa., which affirmed the denial of benefits. The Supreme Court reversed, and these judges are now receiving their pension and medical benefits.

that retirement medical benefits were to be treated in the same manner as other forms of retirement benefits," the Third Circuit was incorrect in saying that the Supreme Court of Pennsylvania "had not applied [the rule that a retirement benefit is a form of deferred compensation] in the precise context of medical benefits" [A20-21, n.13].

It was clearly established in Pennsylvania as of June 17, 1994, that the right to receive medical benefits is a form of deferred compensation which, upon vesting, gives rise to unalterable contractual rights, that is, lifetime medical coverage is a retirement benefit. *Bellomini, supra*, 445 A.2d at 738; *Snyder and Shiomos v. Administrative Office of Pa. Courts, supra*; *Snyder and Shiomos v. State Retirement Board, supra*; *Shiomos v. State Retirement Board*, 533 Pa. 588, 626 A.2d 158, 159 n.4, 160 n.7 (1993).

Snyder and Shiomos considered lifetime medical insurance coverage to be a retirement benefit.[12] *Glancey, supra*, 610 A.2d at 31 (Nix, C.J., dissenting), said compensation includes medical benefits and retirement funds.

Bellomini, supra, was decided under the Pennsylvania Public Employee Pension Forfeiture Act, 43 P.S. § 1313 ("Forfeiture Act"), involved separate cancellation of pension benefits and medical benefits, and considered health insurance to be a retirement benefit. Employees of the Administrative Office (petitioners herein), notified Cianfrani that since his retirement pension benefits had been terminated by the State Employees Retirement Board, pursuant to the Forfeiture Act, his retirement medical benefits were also being cancelled. The Supreme Court affirmed the Commonwealth Court's

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[12]*Snyder and Shiomos* were reversed and remanded on other grounds, 533 Pa. 269, 621 A.2d 563 (1993), for reconsideration in light of *Glancey*.

reversal of the actions of the Pension Board and the Administrative Office, and thus, reinstated both the pension benefits and the medical benefits to which Bellomini was entitled. "Comprehensive lifetime healthcare coverage" is a retirement benefit (Roberts, J., dissenting but undisputed, 445 A.2d at 742).

The Forfeiture Act applies to both retirement pension benefits and to retirement medical benefits. 43 P.S. § 1313.

Pennsylvania cases dealing with pensions use the terms "pensions" and "retirement benefits" interchangeably. And if any one retirement benefit is granted, then all benefits are granted, including medical benefits. For example, see *Bellomini* and *Shiomos*, *supra*.

It was clearly established in Pennsylvania as of June 17, 1994, that public employees, including the judiciary, could be disqualified from receiving benefits under the Forfeiture Act, *only* if convicted of one of 22 enumerated crimes in the Forfeiture Act (§ 1312). *Shiomos*, *supra*; *Miller v. Commonwealth*, 498 Pa. 103, 445 A.2d 88 (1981); *Burello v. State Employees Retirement System*, 49 Pa.Cmwlth. 364, 411 A.2d 852 (1980). Mr. Larsen was not charged with or convicted of committing any of these 22 enumerated crimes.

Miller, *supra*, declared retroactive applications of the Forfeiture Act to be unconstitutional.

Burello, *supra*, found that retirement benefits constitute a property right; invalidated that part of the Forfeiture Act (§ 7), which made the act, effective July 8, 1978, retroactive to December 1, 1972; and, held the Forfeiture Act provision requiring retroactive forfeiture of pension benefits for conviction of a crime (limited to 22 enumerated crimes) related to public office effected an impairment of contract

obligation under the Contract Clause, and was also unconstitutional as an *ex post facto* law, in that § 7 renders an act punishable in a manner in which the act was not punishable when committed.

Zimmerman, supra, held that the Forfeiture Act cannot be applied retroactively to a member of the State Employees Retirement System whose pension had vested before adoption of the Forfeiture Act, because such application results in an impairment of contract; and, that the Forfeiture Act does not apply to acts committed before its adoption.

Zimmerman was applied in *Shiomos*, 626 A.2d at 161-162, and *Apgar v. State Employees Retirement System*, 655 A.2d 185, 187-188 (Pa.Cmwlth. 1994), that passage of the Forfeiture Act was a unilateral action affecting an employee's contractual right to receive his pension, and as such, could not alter the terms of the existing pension contract. The Forfeiture Act was applied to former Judge Shiomos and Ms. Apgar because of changes in their employment after the effective date of the Forfeiture Act: Judge Shiomos assumed a second term of office and Ms. Apgar was promoted to a new position. Thus, new contracts were created between the parties, which incorporated the Forfeiture Act.

Article V, § 16(b), must be construed and applied in accordance with the caselaw applying the Forfeiture Act. Under such authorities. enactment of § 16(b) was a unilateral action affecting Mr. Larsen's contractual right to receive his retirement benefits, and as such, could not alter the terms of his then-existing retirement contract. Mr. Larsen's situation is unlike former Judge Shiomos and Ms. Apgar because he did not have any change of employment after § 16(b) was adopted (5/18/93) or became effective (8/18/93). Mr. Larsen was then in the middle of one of his ten-year terms (which began in January 1988), and thus, no new contract had been

created which could have incorporated the 1993 § 16(b) amendment into Mr. Larsen's employment contract.

Indeed, the Supreme Court of Pennsylvania, by action of petitioners Nix, Flaherty, Papadakos, Zappala, Cappy and Montemuro, specifically rejected the concept that the 1993 § 16(b) amendment applied to then Justice Larsen, because when petitioners suspended Mr. Larsen on October 28, 1993, they continued to pay him his full salary and to provide him with his full medical and health benefits, contrary to the 1993 § 16(b) amendment.

Moreover, all conduct that Mr. Larsen was criminally charged with or convicted of, and the conduct alleged in the seven Articles of Impeachment, occurred *before* the amendment of Article V, § 16(b), August 18, 1993.

Accordingly, in light of the clearly established law of the highest court in Pennsylvania, petitioners, as reasonable Supreme Court justices and court administrators, knew or should have known, that their June 17, 1994, revocation of Mr. Larsen's right to lifetime medical benefits, which right had vested as of December 12, 1989, was an impairment of the contract between Mr. Larsen and Pennsylvania, and thus was a violation of his right to such benefits.

The failure of the justices to follow clearly established law is particularly egregious, since it is the law of their court that they did not follow. Five of the seven justices, now petitioners, participated in creating the law of the inviolate nature of the vesting of all retirement benefits.

Due process

Petitioners revoked Mr. Larsen's benefits without notice and without a pre or post-revocation hearing.

It was clearly established as the law of the United States as of June 17, 1994, that contractual rights are property interests under the Due Process Clause of the Fourteenth Amendment. *U.S. Trust Co. v. New Jersey, supra*, 431 U.S. at 19 n.16 (contract rights, like a professional license, are a form of property); *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974); *Fleming v. Nestor*, 363 U.S. 603, 610-11, 80 S.Ct. 1367, 1372-73 (1960)(plaintiff had reasonable expectation of receiving pension benefits).

It was clearly established in Pennsylvania as of June 17, 1994, that contract rights are a form of property, and as such cannot be taken without due process of law. *Lyness v. State Bd. of Medicine*, 529 Pa. 535, 605 A.2d 1204, 1207 (1992) (revoking professional license triggers protective mechanism of procedural due process, which includes notice and hearing).

Mr. Larsen's retirement benefits are property within the meaning of the Due Process Clause of the Fourteenth Amendment. Due process contemplates a state not abrogating its obligations. *Lyness*; *Schware v. N.M. Bd. of Bar Ex.*, 353 U.S. 232, 77 S.Ct. 752, 760 (1957); *Rhode Island Nat. Ed. Assoc.*, *supra*. Property may be taken for a public purpose, but only if notice is given, a hearing is provided, and just compensation is paid. Mr. Larsen did not receive notice, did not have a hearing, and did not receive just compensation, on the state's revocation of his retirement benefits.

The Third Circuit held that because Mr. Larsen "had a property interest in his medical benefits he was entitled to

some sort of hearing with respect to their termination" [A22]. Petitioners conceded in the court of appeals, that if Mr. Larsen had a property interest, he was entitled to some sort of hearing [A22].

Petitioners' contention (p. 15) that no post-conviction (criminal) hearing is required to deprive an individual of a property or liberty interest is a *non sequitur*. Revocation of Mr. Larsen's retirement medical benefits was not a result of a criminal conviction. Citations to and explanations of 18 Pa.C.S.A. § 6105, 25 P.S. § 961.501 and 18 U.S.C. § 921(g), are confusing, misleading, irrelevant and incorrect. These rights are not contractual rights. Neither Pennsylvania statute is applicable to Mr. Larsen.

First Amendment

The First Amendment, applicable to the states through the Fourteenth Amendment, says in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Applicable First Amendment jurisprudence was well established in Pennsylvania as of June 17, 1994.

To state a claim of retaliation in violation of First Amendment rights, plaintiff must show he was engaged in an activity protected by the First Amendment. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Plaintiff must also show the activity in question was a substantial factor motivating the government's alleged retaliatory action. *Mt. Healthy v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 575-76 (1977).

It was clearly established as of June 17, 1994, that the First Amendment gives individuals the right to petition the government for redress, considered a form of speech.

It was clearly established as of June 17, 1994, that the First Amendment protects individuals against retaliation for exercising their rights to petition the government, as a form of protecting speech.

It was clearly established as of June 17, 1994, that the First Amendment protects the rights of high state officers to free speech. *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339 (1966). *Bond* said the central commitment of the First Amendment is that "debate on public issues should be uninhibited, robust, and wide-open," 87 S.Ct. at 349, citing *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 721 (1964).

Paragraphs 1 - 125 of the amended complaint [A108-A137] were incorporated in the First Amendment retaliation count against petitioners. See specifically, ¶¶ 21-24 of the amended complaint [A112-A115].

The amended complaint alleges the real reasons petitioners retaliated against Mr. Larsen were the statements in his petitions alleging misconduct of his fellow justices, including "impropriety by Chief Justice Nix in interfering in a pending trial in Lehigh County, Commonwealth v. David Lee Yohn, and in the Supreme Court's handling of Yohn's petition for allowance of appeal [A112]" and "that despite the obvious improper behavior of Chief Justice Nix, no investigation was undertaken or charges made against Chief Justice Nix [A113]."

Crawford-El declined to adopt heightened pleading standards.

Mr. Larsen's allegations are more than "bare allegations of malice" as petitioners contend (pp. 17-19).

Conclusion

Petitioners are not entitled to qualified immunity under the "clearly established" standard of any circuit. As of June 17, 1994, the contours of the rights under U.S. and Pennsylvania law were clear, and petitioners, as reasonable officials, knew or should have known that revoking Mr. Larsen's retirement medical benefits violated those rights. Petitioner-justices participated in writing the Pennsylvania case law that established such rights; petitioner-officials of the Administrative Office were parties to litigation that helped create such case law.

Respondent Rolf Larsen asks the court to deny the petition of petitioners Nix, et al., for a writ of certiorari to review the August 11, 1998, decision of the court of appeals.

Respectfully submitted,

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